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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 149.

JAMES B. DINGLEY AND FULLER DINGLEY, COPARTNERS UNDER THE FIRM NAME OF DINGLEY BROTHERS, PLAINTIFFS IN ERROR,

vs.

WESLEY M. OLER AND WILLIAM H. OLER, COPARTNERS UNDER THE FIRM NAME OF W. M. OLER & COMPANY.

No. 150.

WESLEY M. OLER AND WILLIAM H. OLER, COPARTNERS UNDER THE FIRM NAME OF W. M. OLER & COMPANY, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED OCTOBER 28, 1882.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Maine, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you between James B. Dingly & Fuller Dingly, both of Gardiner, in the district of Maine, plaintiffs, & Wesley M. Oler & William H. Oler, both of Baltimore, Maryland, & copartners under the firm name of W. M. Oler & Co., a manifest error hath happened, to the great damage of the said James B. Dingly & Fuller Dingly, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS,
Clerk of the Circuit Court of the United States, District of Maine.

Allowed by—
HORACE GRAY,
Associate Justice Supreme Court United States.

2 *Return on Writ of Errror.*

And now here the judges of the circuit court of the United States in and for said district make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof, I, A. H. Davis, clerk of said circuit court, have hereunto set my hand and affixed the seal of said court, this — day of October, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

[Endorsed:] Dingley *et al.*, pl'tiff- in error, *v.* Oler *et al.*, def't- in error. Writ of error.

3 The United States of America to Wesley M. Oler & William H. Oler, both of Baltimore, Maryland, copartners under the firm name of W. M. Oler & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein James B. Dingly & Fuller Dingly, both of Gardiner, Maine, copartners under the firm name of Dingly Brothers, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace Gray, Justice of the Supreme Court of the United States, this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and eight-two.

HORACE GRAY,
Associate Justice.

4 DISTRICT OF MAINE, *ss:*

SEPTEMBER 26TH, A. D. 1882.

We hereby acknowledge & due sufficient and legal service of the within citation, and we acknowledge service of the writ of error aforesaid by a copy thereof being this day lodged for the defendants in error in the clerk's office, where the same remains.

W. M. OLER & CO.,
By W. F. LUNT, *Their Att'y.*

[Endorsed:] Dingly *et al.*, pl't'ff- in error, *v.* Oler *et al.*, def't- in error. Citation.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maine, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between James B. Dingley and Fuller Dingley, both of Gardiner, in said district of Maine, copartners under the firm name of Dingley Brothers, and citizens of the State of Maine, plaintiffs, and Wesley M. Oler and William H. Oler, both of Baltimore, in the district of Maryland, copartners under the firm name of W. M. Oler & Co., and citizens of the State of Maryland, defendants, a manifest error hath happened, to the great damage of the said Wesley M. Oler and William H. Oler, copartners under the firm name of W. M. Oler & Co., as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS,
Clerk of the Circuit Court of the United States, District of Maine.

Allowed by—
HORACE GRAY,
Associate Justice Supreme Court United States.

6 *Return on Writ of Error.*

And now here the judges of the circuit court of the United States in and for said district make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned and of all proceedings therein.

In testimony whereof, I, A. H. Davis, clerk of said circuit court, have hereunto set my hand and affixed the seal of said court, this —— day of October, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

[Endorsed :] Oler *et al.*, pl't'ff- in error, *v.* Dingley *et al.*, def't- in error. Writ of error.

7 The United States of America to James B. Dingley and Fuller Dingley, both of Gardiner, in the district of Maine, copartners under the firm name of Dingley Brothers, citizens of the State of Maine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein Wesley M. Oler and William H. Oler, both of Baltimore, in the district of Maryland, copartners under the firm name of W. M. Oler & Co., citizens of the State of Maryland, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace Gray, Justice of the Supreme Court of the United States, this twenty-sixth day of September, in

the year of our Lord one thousand eight-hundred and eighty-two.

HORACE GRAY,
Associate Justice Supreme Court United States.

8 OCT. 17, 1882.

Due & legal service of the within citation on the defendants in error, James B. Dingley & Fuller Dingley, copartners the firm name of Dingley Brothers, is hereby acknowledged the same as if made by an officer under oath, and service of the writ of error by a copy duly deposited in the clerk's office in the circuit court.

BAKER & BAKER,
Their Attorneys.

[Endorsed:] Oler *et als.*, pl't'ff- in error, *v.* Dingley *et als.*, def't- in error. Citation.

9 UNITED STATES OF AMERICA, *District of Maine*, } *ss:*

First Circuit.

At a term of the circuit court of the United States for the first circuit, begun and held at Portland, within and for the district of Maine, on Monday, the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and eighty-two, the twenty-third day of said April falling on Sunday.

Before the Honorable John Lowell, circuit judge.

JAMES B. DINGLEY *et al.*, of Gardiner, in the county of Kennebec, copartners under the name and style of Dingley Brothers, Plaintiffs,

v.

WESLEY M. OLER *et al.*, of Baltimore, in the State of Maryland, copartners under the name and style of W. M. Oler & Co., Defendants.

} No. 42.

In a plea of the case for that at said Gardiner, on or about the —— day of September, 1879, in consideration that the plaintiffs then and there promised to furnish, in manner accustomed, on board such vessels as should be provided to receive the same by said defendants, so many cargoes and so much ice as said defendants should require during the year 1879, said ice to be heavy and perfectly square, such as was demanded by said defendants' oyster trade in said Baltimore. The defendants then and there promised the plaintiffs, in exchange therefor, to deliver to them, from the defendants' ice houses, in like manner, the same quantity and quality of ice in the year 1880.

And the plaintiffs further aver that, in pursuance of their agreement aforesaid and under the terms thereof, they did furnish and deliver to said defendants, in manner agreed, during the year

10 1879, seven cargoes of ice, amounting in the aggregate to three thousand two hundred forty-five $\frac{25}{100}$ (3,245$\frac{25}{100}$) tons, of the quality stipulated, and that they have done and performed all things required of them by their said agreements.

Whereupon the defendants became liable to return and deliver in like manner to said plaintiffs the same quantity, to wit, three thousand two hundred and forty-five $\frac{25}{100}$ tons of ice, of the same quality, from said defendants' ice houses, in the year 1880.

Yet, though thereto properly and often requested, and though the plaintiffs have been ready and have offered to do all things required of them to do by the agreement, the defendants have refused hitherto, or at any time during the year 1880, to furnish or to deliver to the plaintiffs said quantity or any quantity of ice under their said agreement and promise.

Thereby, and by reason of the defendants' refusal to perform their said agreement, the plaintiffs have lost their said ice, and been put to great trouble and expense in the effort to procure other ice to take the place of that which the defendants thus refuse to furnish. All of which is to the damage of the said plaintiffs, as they say, the sum of thirty thousand dollars.

The writ is dated July 21, A. D. 1880.

This action was brought for and entered in the superior court begun and holden at Augusta, within and for the county of Kennebec, in the State of Maine, on the first Tuesday of September, anno Domini 1880, when and where the defendants appeared by their attorneys and filed pleadings; thence the action was continued in said superior court until the December term thereof, anno Domini 1880, when the defendants file a petition, representing that James B. Dingley and Fuller Dingley, the plaintiffs in said action, are citizens of the State of Maine, and that the defendants in said action are citizens of the State of Maryland; that the amount in dispute, exclusive of costs in said action, exceeds the sum or value of five hundred dollars; also, that the petitioners have filed an affidavit, as re-
11 quired by the Revised Statutes of the United States, section 639, stating that they have reason to believe, and do believe, that from local prejudice or local influence they will not be able to obtain justice in said State court, and praying that said cause may be removed for trial to the circuit court of the United States within and for the district of Maine, next to be holden at Portland, in said district, on the twenty-third day of April, A. D. 1881.

And thereupon, at said December term of said superior court, the bond in such case made and provided having been filed and approved by the presiding judge, the prayer of said petition was granted, and It was ordered that said action be transferred to the circuit court of the United States for the district of Maine, as prayed for in said petition.

And at said April term of this court said cause was entered by the defendants and copies of the case filed therein on the first day of its session, according to the provisions of the statute of the United States in such case made and provided.

Said action was continued to this term.

And now the said defendants come and defend, when, &c., where, &c., and for plea say, that they never promised the plaintiff- in man-

ner and form as they have in their writ declared against them, and of this they put themselves upon the country.

By J. W. SPAULDING AND
W. F. LUNT,
Their Attorneys.

And the plaintiffs likewise,

By BAKER & STILPHIN.

Whereupon said cause was by the court—Fox, J.,—committed to a jury duly empannelled and sworn; but before a full hearing thereon said cause is withdrawn from the jury, and the parties file the following:

12 *Stipulation.*

Circuit Court of the United States, District of Maine. September T., A. D. 1881.

JAMES B. DINGLEY *et al. v.* WESLEY M. OLER *et al.*

In the above-entitled cause it is hereby stipulated that a trial by jury shall be waived, and that said cause shall be submitted to the court for its decision, each party reserving the right to exceptions and to a writ of error.

BAKER & STILPHIN,
Attorneys for Plaintiffs.
J. W. SPAULDING AND
W. F. LUNT,
Attorneys for Defendants.

And now, in accordance with said stipulation waiving a trial by jury, said cause came on to be heard by the court—Lowell and Fox, J. J.,—and there was then and there introduced and heard the following

Testimony.

JAMES B. DINGLEY, called by the plaintiffs, being sworn, testified as follows:

My name is James B. Dingley; reside at Gardiner, Maine; am a member of the firm of Dingley & Son, which is composed of myself and brother, Fuller.

In 1879 we had 6,000 tons of ice to dispose of; we purchased it for a party who had become insolvent, and who did not take it; wrote defendants in relation to it Aug. 15, 1879.

Letter—Dingley to Oler—Produced and Identified, marked A.

GARDINER, *Aug.* 15, 1879.

Messrs. Wesley M. Oler & Co., Baltimore.

DEAR SIRS: Through the knavery and unmeasured villainy of the Barkers, we find ourselves saddled with six thousand
13 tons of ice, in this wise: Last winter, under their fair promises, we were induced to purchase of Mr. Berry said quantity of ice, advancing on the same $2,000. We suppose this purchase

would have been tendered you but for the fact of its having been put afoot before it was determined that you would harvest any for sure on the Kennebec, and, in fact, later we came near offering you a trade for six thousand tons additional for them, but now here we are with this upon our hands, and probably no sale for it this season; and by the terms of the contract with Mr. Berry the ice is forfeited to him upon the closing of the river if not shipped.

Now, it occurred to us that we might make some exchange with you in some manner that might save us, or partially so, and not greatly to your disadvantage.

We have been waiting to see what turn matters took in Washington, but have now concluded to abandon the idea of placing any of it there this season. Do you not think you might relieve us in some way without damage to your own interest?

Truly yours, DINGLEY BROS.

Letter—Olin to Dingley—Produced and Identified, marked B.

BALTIMORE, MD., *19th August*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of the 15th duly received and contents noted. We feel sorry that you should be placed in your present position in regard to the 6,000 tons of ice, and, were it in our power, would be glad of the opportunity to do you the favor of relieving you of it. It was our intention, when we commenced to ship ice from the Kennebec this season, to ship only about 2,000 tons, but through
14 a misunderstanding with our commission man we have been crammed with vessels and obliged to ship more than 4,000 tons, thus giving us more than we wanted—having still a great deal of Susquehanna ice on hand. After the two vessels are loaded which Marson has there now we shall close our houses for the season, and in fact offered those two vessels to a party last week who was in the market.

Hoping you may succeed in disposing of your ice, we are,

Yours truly, ——— ———.

Letter—Dingley to Oler—Produced and Identified, marked C.

GARDINER, *Aug.* 27, 1879.

Messrs. Wesley M. Oler & Co., Baltimore.

DEAR SIRS: Yours of the 19th was duly received. We were earnestly hoping that you might be wanting to ship more ice from the Kennebec. We were thinking that you usually shipped a few thousand tons late for oysters, &c., and were thinking you might make an exchange with us in some way. In that case, of course, we could not expect you to buy at any reasonable rate, if it all, but thought perhaps you might ship from ours at Berry's, and let ann (?) some in your buildings, and will ask you to do something of this kind if you make further shipments.

Don't you think one of you will be down soon? We are under the impression that Mr. M——— has loaded very cheaply this sea-

son; and the place is improving in appearance, and within three years you will be proud of it we are sure.

Mr. Berry has just returned from Washington; could do nothing with the Barkers, who owe him $600 to $800, and we notice the business now goes into the old lady Barker's hands. The boys, we suppose, have run it far as they can without paying something, and of course they do not intend doing that any way. We want to see who steps forward to winter them through the season. They are sure to be paupers on somebody.

We judge, from the promptness with which you are taking in your paper, that prosperity still abides with —, and that is a source of pleasure to us at all times.

Hoping to see you this way ere long, we remain,

Truly yours, DINGLEY BROS.

Letter—Oler to Dingley—Produced and Identified, marked D.

BALTIMORE, MD., 3*d Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

DEAR SIRS: We herewith enclose you our check for 79\frac{98}{100}$ in full of account as per your statement; this closes up the old matter. We would like you to mail us any account you may have against us for merchandise furnished Marson to 1st Sept., and furnish it in the future every quarter, as we wish to keep up straight.

At present writing we do not expect to ship any more ice, but if we should need one more cargo this fall we will bear you in mind.

Weather here continues warm and business heavy. We think, from the present outlook, that we can retire the notes held by you as they mature, and we may here mention that never, since this has been a business of any size, have we had less paper out and a better prospect of getting along without putting out any in the future.

With all regards to all, we are,

Yours truly, W. M. OLER & CO.

P. S.—The writer and W. Geo., all things favorable, will see you in Maine about Oct. 10th.

Letter—Dingley to Oler—Produced and Identified, marked D 1.

GARDINER, *April* 3, 1879.

Wm. H. Oler, Esq., Baltimore.

DEAR SIR: Your postal is received and we are glad to know you are all well.

We note what you say about the prospect of taking some of our ice, and can only say that we earnestly hope that you will be able to take a portion, if no more of it. Of course we expect you to make such terms and arrangements as will not result to your disadvantage. We understand that Berry is now shipping ice for Haynes & De Witt, and we rather think to your city; we do not know at what figure, but suppose it to be pretty cheap. Can't you dispose of ours to Messrs. Cockran? It is understood that he must buy some. We shall be glad to see the boys when they come; are you not also

coming? Hoping to hear something favorable regarding our ice, with you, we remain,

Truly yours, DINGLEY BROS.

Letter—Oler to Dingley—Produced and Identified, marked E.

BALTIMORE, MD., 6*th Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: In answer to yours received this morning, I have seen Messrs. Cockran & Co., and they inform me that they
17 would need yet this season 5 or 6 thousand tons of ice and are ready to receive proposals. I pressed them for an offer, but they refused to make any, which was, however, natural, considering our relative positions. If you would not think us too officious, we would suggest that you write them, naming the lowest possible figure you would take. It occurs to us you might be able to undersell your competitors, even should you make a loss by doing so, as your position in regard to the ice would be sure to force you into a larger loss in the end.

We have decided to ship one more cargo and have ordered a vessel for that purpose. It would, of course, be more convenient for us to ship this cargo from our own houses, but, remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house should our terms be agreeable to you. We, of course, do not entertain the idea of buying, having a superabundance on hand, but will take this cargo and return same to you next year from our houses.

We wish heavy and perfectly square ice, as this is the only kind we can use, for we want it for our oyster trade which demands this kind. If this is satisfactory, you may show this letter to Marson as an order from us.

Yours truly, W. M. OLER & CO.

Letter—Dingley to Oler—Produced and Identified, marked F.

GARDINER, *Sept.* 9, 1879.

Messrs. W. M. Oler & Co., Baltimore.

DEAR SIRS: Yours of 6th is received, and we are very glad of the opportunity of starting a little of our ice, and you shall
18 have the best there is, and we think you will not regret your effort to accommodate us.

From what you write, we think you have in mind to load the ice yourselves. Our contract with Mr. B. is for him to pack on board suitably dunnaged, &c.; to this we do not suppose you will object *to this*, as it saves you so much funds until another season; and this we are willing to do, and more if ice should be worth more than 75 cents per ton another season. We shall give you some advantages on what you may have of ours in your buildings, and can most likely furnish you with some room in the old buildings (Barker's) if you should need it. This would protect you from loss in that direction in case of a good winter, and, in fact, we do not propose

for you to become losers on account of extending us this accommodation.

Mr. Marson will, we suppose, oversee the loading himself, and object anything not fully up to the standard; but you will find Mr. Berry first class.

We thank you for your attention to our interest with Messrs. Cockran & Co., and for your suggestion in that line, and wish you had went still further, indicating some figure at which you think they might buy at.

We were thinking like this: that you might sell it as your own to them and allow us to ship it to them, and thought perhaps you might get an indication from them what they could do, or what they would pay. We have in mind 60 f. o. b., but think perhaps it might be best to let a portion of it go even less rather than not sell. We think, upon the whole, we will not make any specific price until we hear from you again, but write them, telling what we have got, &c., and will submit to you what you think it is best to ask. This, we are aware, is little peculiar, but the position is not less so, the object being not to see how much can be made, but how little we can lose. Let us have your views frankly, and much oblige,

Truly yours, DINGLEY BROS.

19 Letter—Oler to Dingley—Produced and Identified, marked G.

BALTIMORE, MD., 13*th Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

DEAR SIRS: Yours of 9th duly received. We find that there is going to be quite a demand for Eastern ice this fall, and we shall be obliged to use more than we calculated on. We have ordered Messrs. Kilham, Loud & Co. to send one vessel to your place every week until further orders.

We note your remarks in regard to this exchange, and assure you that we felt satisfied that it would all come out right in the end. We see you do not fully comprehend the position of Cochran & Co. towards ourselves. There is no love lost between the two concerns, and have not seen them since your last, because we felt sure that should they have an idea that they were benefiting us they would rather pay somebody else more than to purchase your ice. This was in our mind when we suggested you to write them. We think their idea is 50 cents per ton, from some remarks they let fall when the writer was talking to them.

We have written Mr. Marson, and given him necessary instructions in regard to overseeing the loading. The arrangement is perfectly pleasant to us; and, in this connection, we would remark, that if you have an idea of renting the old Barker place, we would like you to await the coming of the writer before closing with anyone.

Yours truly. ——— ———.

Letter—Oler to Dingley—Produced and Identified, marked H.

BALTIMORE, MD., 24*th Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of 22d, enclosing check for $500, duly re-

ceived. We took up the note due to day, and herewith en-
20 close you renewal. We appreciate your kindness, and think we can meet the balance as they mature. We will continue to order one vessel per week from your place for the present.

Yours truly, W. M. OLER & CO.

Letter—Oler to Dingley—Produced and Identified, marked I.

BALTIMORE, MD., 17*th Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: In consequence of some heavy payments we are now liquidating at our bank, we find ourselves obliged to ask you to extend the payment due to-day, and we may probably ask the same favor for the one due the 24th. Those due in October we expect to retire.

Relying on your granting our request, we have this day made draft on you for $500 at 60 days, and have used the proceeds to take up note due to-day. We are getting anxious about ice, and hope you will see that it is shipped as soon as the vessels arive.

Since writing you Cockran came into our office and spoke of your ice, and whilst he did not make a direct offer, he intimated as much that if you would accept 40 cents they would take 2,500 tons, and probably more. We endeavored to get an offer from him at 50 cents, but he said he thought he could buy ice outside of the river at 50 cents, thus saving the 10 cents Kennebec towage. We then asked him if he would make a direct offer of 40 cents. He declined doing so, as his partner was absent from city, but thought they would do so when he returned.

Yours truly, W. M. OLER & CO.

21 Postal Card—Dingley to Oler—Produced and Identified, marked 1.

GARDINER, *Sept.* 17, 1879.

DEAR SIRS: Yours of 13th is in hand, and we are very glad that you are able to ship more ice, and hope it may turn out to be considerable. We suppose you will find it, like your own, of very fine quality. We now understand about yourselves and Messrs. C. & Co., and it's all right. We have written them, trying at 60 cents. We are told sales have been made at that.

DINGLEY BROS.

Letter—Oler to Dingley—Produced and Identified, marked J.

BALTIMORE, MD., 20*th Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

DEAR SIRS: Your two P. C's of 17th and 19th received. We have been in something of a stew over our vessel as we are now running short of Eastern ice. Marson reports the vessel as having arrived on the 12th, and she was not loaded until the 18th. He gives no explanation of this, but tells us there are other vessels to load at Berry's shortly and is afraid ours may be delayed. In that case we shall be obliged to load them at our place.

We note your offer to Messrs. Cockran & Co., and hope you may secure the order, but fear parties outside of the Kennebec may get the advantage in having no towage to pay.

We appreciate your remarks in regard to the old place, and when our W. M. Oler arrives at Gardiner we may probably be able to make some arrangements in regard to it.

Yours truly, W. M. OLER & Co.

22 Letter—Oler to Dingley—Produced and Identified, marked K.

BALTIMORE, MD., *8th Oct.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: In answer to your P.C. of 3d inst.—after our vessels had arrived (which they did both same time) we saw Mr. Cockran and requested him to come over and take a look at the quality of the ice, telling him it was from your place. He promised to come, and stated at the same time that he was not so sure now that he would want any more ice this season. The ice has turned out splendidly, and we can take no exception to either its quality or the stowing of it.

We have to-day paid another of your notes, making two this month so far, and we see no reason why we should not meet the balance as they mature. We now think we can see the end of these notes, and shall be as much pleased as you are when we are through with them.

The writer leaves here Monday morning and will leave Boston for your place Wednesday evening. If you have an opportunity, you would confer a favor on the writer by securing him two single staterooms on the Gardiner steamer for that night.

Yours truly, W. M. OLER & Co.

Telegram—Oler to Dingley—Produced and Identified, marked L.

BALTIMORE, MD., *Oct.* 9.

To Dingley Bros:

See Berry and have our vessels loaded at once. Letter.

W. H. OLER.

23 Letter—Oler to Dingley—Produced and Identified, marked M.

BALTIMORE, MD., *4th Nov.*, 1879.

Messrs. Dingley Brothers, Gardiner.

GENTLEMEN: Enclosed we hand you our check for $530.25 for mortgage note and interest due this day. We did not notice the fact of it being due in Gardiner until we were about to draw our check to pay it here.

Hoping that you have protected our note and that this will be satisfactory, we are,

Yours truly, W. M. OLER & CO.

P. S.—Three schooners in together, and are rushed to death discharging them, with W. Geo. and W. H. O. out of town.

Letter—Oler to Dingley—Produced and Identified, marked N.

BALTIMORE, MD., 19*th Nov.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of 18th, enclosing notice of maturity of draft, to hand. Enclosed please find our check No. 1,619, for five hundred dollars, which you will please use in retiring the draft. We again made the mistake of supposing the payment due here until the absence of a notice made us look to the origin of the obligation, when we wired you "check by mail for draft due to-day. Please protect us."

We are extremely obliged for your kindness in looking after our interest in the law case, and hope the decision may be such as you seem to anticipate.

24 We to-day received B. of L. from Marson for a small schooner of 180 tons, which seems to have been ahead of the "Bowers." These two vessels we are sure will see us through the winter.

We will write you shortly in reference to the Barker property. With regards to all, we are,

Yours truly, W. M. OLER & CO.

P. S.—We are all in excellent health, and have had an unprecedently long and heavy season; weather now quite cold.

Letter—Oler to Dingley—Produced and Identified, marked O.

BALTIMORE, MD., 6*th Dec.*, 1879

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Your several letters and P. C. to hand, as also the two drafts. We note the fact of your sending us our drafts several times before you had received the checks for them, and appreciate your confidence. We are obliged for your suggestion and advice concerning the anvisability of our building, and shall not go into it without mature consideration. As you suggest, we have overhauled the account of Mr. Berry, and finding it O. K. have placed it to the credit of your account. We have had un exceedingly dry fall, and there is scarcely a pond in the neighborhood of the city full. But it has been raining steadily all day to-day, much to the satisfaction of the farmers and local ice dealers. There is as yet no sign of ice here, although we are going ahead and putting everything in running order. With regards to all our friends, we are,

Yours truly, W. M. OLER & CO.

25 Exhibit of Shipments—Produced and Identified, marked P.

Memorandum Ice shipped to "Oler" on account Dingley Bros.

1879.					
Sept.	18.	Schooner	Carrie Bell	$442\frac{25}{100}$	tons.
"	19.	"	Addie M. Bird	465	"
Oct.	17.	"	Helen Maria	380	"
"	18.	"	Jennie F. Willey	459	"
"	11.	"	Isaac T. Campbell	638	"
Nov.	18.	"	Mary M. Dyer	180	"
"	19.	"	R. Bowers	681	"
				$3,245\frac{25}{100}$	"

Gardiner, Dec. 1, 1879.

(It is admitted by defendants that the amount—$3,245\frac{29}{100}$ tons—is correct, and that the value of ice on the river throughout July was $5 per ton.)

I had conversation with William Oler, in June or July, at Gardiner. He said: "What about that ice we had of yours?" I said I was expecting parties we had sold it to would call for it any day; expected they would call in May. Oler said he did not know about that—delivering their ice to us, taking it at a time when ice was worth 50 cents per ton and delivering it back when it was $5 per ton; he did not think that was right. I said: "If you refuse to deliver that ice you will ruin me. I have sold it; and ice is so high now it would ruin me if you refused to deliver it." Oler said he was not aware we had disposed of the ice. I said his father was fully aware of it when he was there. He said he would not say anything further until he went home, and then he would communicate with us.

I received a letter afterwards from the defendants.

26 Letter—Oler to Dingley—Produced and Identified, marked R.

BALTIMORE, MD., *7th July*, 1880.

Messrs. Dingley Bros., Gardiner, Me.

DEAR SIRS: As per promise of our W. M. O., we write you concerning the ice we got from you last fall. We have before us the whole of the correspondence on that head, and note throughout the same that you promise to stand between us and any loss. We quote from yours of September 9, 1879, on this head, as follows:

"In fact, we do not propose for you to become losers on account of extending us this accommodation."

Our W. H. O. does not remember your having spoken to him while at Gardiner about your intention of selling the ice, and was very much surprised when informed that you had done so.

We are very sorry indeed that this question should have arisen between us, who have been on such friendly terms hitherto, but we feel that it is not just or equitable for you (in consideration of the ice being used by us only upon your earnest solicitation, and upon your representation that you would lose the whole unless we assisted you

by taking some) to expect us to give you ice now worth $5.00 per ton when we have letters of yours offering the ice that we got at fifty cents per ton. We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point. Again expressing our sincere regret that any complications should arise between us, and assuring you of our innocence in the matter, we are,

Yours truly, W. M. OLER & CO.

27 Letter—Dingley to Oler—Produced and Identified, marked S.

GARDINER, *July* 10, 1880.

Messrs. W. M. Oler & Co., Baltimore.

DEAR SIRS: Yours of 7th is in hand, and we must say the conclusion you have come to greatly astonishes us.

Our sole object in making this exchange, no one knows better than yourselves, was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure, and in confirmation of this we refer you to your own proposition, made under date of September 6th, viz:

"It would, of course, be more convenient for us to ship this cargo from our own houses; but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you.

"We, of course, do not entertain the idea of buying, having a superabundance on hand, but will take this cargo and return same to you next year from our houses."

Upon this we have acted, and in the utmost good faith made sale of the ice; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery, seems to us hardly right.

Now, whatever the final settlement of this matter is to be, we want you to fill our order; otherwise, we cannot tell what the result might be.

It is not in our minds to do otherwise than right with any one, and certainly with yourselves; and it is our great desire not to get complicated with the third party in that matter, and assure you that your regrets cannot exceed ours that there should have arisen any difference of opinion concerning this affair, and certain it is
28 that neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view upon further reflection, we remain,

Truly yours, DINGLEY BROS.

Letter—Oler to Dingley—Produced and Identified, marked T.

BALTIMORE, MD., 15*th July*, 1880.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of 10th duly received, and in reply would state that our desire to do right is quite as sincere and earnest as your own, and that we regret our inability to see the matter referred

to in the same form in which you state it. The case, briefly stated, appears to us thus, as we think the correspondence of last year will show: being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances we at length agreed, purely for your accommodation and relief, to take one cargo, and later, under the same influences, took more. Now you ask us, at a time when we are pressed by our sales and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends, but regard it our duty to protect our own interests, always, however, with a proper regard to the dictates of right. We cannot, therefore, comply with your request
29 to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th..

You do not reply to our arguments, but simply asks us to surrender our well-formed opinion.

Can you reasonably ask us to do this?

Is not your usually clear and equitable judgment clouded by the manifest considerations of self-interest pressing upon you?

We beg you to consider anew all the circumstances of the transaction and your assurances to us as inducements to make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to hear from you in reply, but would be more pleased to have a personal interview, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever before. We are deprived of the services of W. Geo., and therefore cannot come to see you.

With regards, we are,

Yours truly, W. M. OLER & CO.

Letter—Oler to Dingley—Produced and Identified, marked U.

BALTIMORE, MD., *April* 1, 1880.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: I take few moments to drop you a line or two. You will find our scale of prices for the present. It may be that as soon as the season opens we may make further advance in prices. As you see, they go into effect to-day. Our prices so far have been kept to the letter, and it looks now like it would be carried out. If so, you can see it will give us a very good ad-
30 vance over previous rates. I presume by the time you get this the river be open. We are in want of some of that ice for our customers, as well as to make trade. We would like Mr.

Marson to get some good man in his place and come to Baltimore for a rest, and see something about the ice trade. We are just finishing our new house on the Union dock. We feel as though we had something to be proud of. It will hold 3,000 tons, and we are now ready for the ice in our stock. As we cannot expect to sell it at once we must store some of it, so they can ship it at once. The rough ice we could deliver at once if it was here. The ice that has been cut in the last few weeks must be poor and the most of it shipped at once, as I learn it is in temporary houses. Mr. Marson thinks he has three nice houses at C. G., and I think he has, and I know he has good ice in them. We think we may have them to spare, but dare not risk selling until September, when we can tell better. It takes a large lot to put us through the year. I hope your business is good and that you may have a prosperous year. W. G. was out yesterday. I expect the ice will be out of the river before you get this letter. The New York dealers are making high figures, up to one dollar.

Yours truly, W. H. OLER.

Postal Card—Oler to Dingley—Produced and Indentified, marked 2.

JUNE 7, 1880.

GENTLEMEN: Your letter at hand. Glad to hear from you. We have had all we could do since I saw you. Building and regular business has taken up my time fully. Wes. gave you some notion about our opposition. They were out of ice from Monday to
31 Saturday. I think our trade is fully up to last year, for May, and far ahead up to that time. I agree with you about supply. If we have a hot summer the stock of ice will be entirely consumed. I think, from the way our houses are turning out, we shall have about 5,000 tons to spare, but will be sure we are right before we move in the matters. W. G. left here this minute with the little children; he is in good spirits, and we hope for the best. Our ice is prime—by far the best that comes to our market; the best of it is, we are getting something for it. I think we made more clear money out of the two last vessels — we ever made out of so much ice. Mr. Marson will not have much let up from this time out. We have four or five vessels taken, and more to come right along. I expect Mr. M. will have to have the wharf built by some others while he is shipping the ice.

Yours truly, WM. H. OLER & CO.

I never made any other arrangement with defendants than that found in the correspondence, and we furnished the ice to defendants in accordance with the correspondence.

We owned the Barker ice houses in 1874.

In the winter—January, 1880—Oler, senior, was in our office. I said to him: "What conclusion have you come to about taking any portion of the Barker building? We have a party in negotiation for their rental, and would like to ascertain what conclusion you come to." He said he could not then decide, but would let us know very soon; he thought he would want a portion to put our ice up—

what he was owing us; he would let us know in a very few days. He was in the office in a few days and I called his attention to it. He said, on looking the matter all over and considering the risk of the field, he concluded that they would build some stacks at
32 the old Dresden —— place, and put up an additional quantity there. I told Oler if he wanted to occupy that quantity of room to put up the quantity he owed us—we would charge him nothing for the rent.

In January I told Oler we had an offer for the ice. I said, "I suppose you do not want to purchase that ice." He said no, he could purchase it cheaper. I told him what we could get for it—what we had been offered for it. He said he could put it up at less than 75 cts. per ton.

Ice of 1879 was much better than that of 1880.

We contracted for the sale of the ice. He (Oler) knew of it; he advised our making the sale. Oler said, in July, he thought they might have from 3,000 to 5,000 tons surplus.

We were called on to deliver the ice under our contract of sale. We had vessels tendered us to load, and we called on Marson & Co.'s agent for the ice. Vessels were not accepted. We have never received any ice from defendants in return for that we let them have.

Cross-examination:

Our contract with Berry was in December, 1879. The balance of ice we did nothing with. We contracted with Hancock & Crowell in January, 1880, for ice.

(Contract with Hancock & Crowell offered—objected to—excluded—exceptions taken and saved, the ice and quantity of ice being admitted.)

I demanded of Berry, in 1880, to furnish me the balance of 6,000 tons of ice. I think my brother was present in the counting-room at the conversation with Oler. In August or September previous we had a talk with Oler about filling the Baker houses jointly—this was with Wesley Oler; conversation may have been in October or November. I think the talk was to rent them one-half of the houses

33 Letter—Oler to Dingley—Produced and Identified, marked V.

BALTIMORE, MD., 22*d Nov.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of the 19th, enclosing our draft for $500, as also your P. C. to our Mr. W. H. O., duly received. Thanks for your kindness for protecting our draft. Enclosed we hand you sundry papers concerning the Barker place, which, now that you are owners of, belong properly to you. Amongst these papers are the letter of Mr. Stilphen to us and an agreement of yours at the time of purchase. We ran across these papers in cleaning out and arranging the papers in our old safe.

The weather here is quite cold and our river is partially closed. This we consider a bad sign for our ice prospects here.

We have talked over the matter of the renting half the Barker place, and concluded that while we are not willing to risk $500 on an uncertainty, at the same time we do not wish to stand in the way of your securing another customer; but we think, in consideration of our position towards each other, that we should have some little preference in the matter, and should suggest that you do not allow us to interfere with your negotiations with other parties, but, should you get a genuine offer for the place, that you give us the preference before closing. Should you not get an offer before the 1st of January, 1880, we will then be prepared to give you a definite answer. Does this suggestion meet yonr views?

We are all well, and with regards to your folks, we are,

Yours truly, W. M. OLGER & CO.

34 Letter—Oler to Dingley—Produced and Identified, marked W.

BALTIMORE, MD., 26*th Nov.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Your P. C. to hand; contents noted.

We are glad you coincide with our views in regard to the Barker place, and in that relation we have instructed Mr. Marson to make inquiries from the different mills as to the price of lumber for ice-house purposes. After getting the figures we will (in case we have to come East) make the calculation as to whether it will pay us best to build or to rent.

We have to-day drawn on you at sight for $500, to take up note due to-day, and enclose you check to meet the draft. We do this because, being the last of the month, we are a little tight, and this will bring our check here, so that we can utilize our first of the month collections. We have now closed out our bills payable account, except the $500 due you 1st December, for which we will mail you a check on the day the note matures, so as not to bring the two checks together. We make this special effort to meet these two notes because, when this is done, we have reduced our bills payable account from $30,000, January 1, 1878, to zero, January 1, 1880, and we hope never to give another note, but to work our business on a purely cash basis. We trust the accommodation we ask will not inconvenience you, and think you have no reason to regret the kind favors you have shown us in the past.

With thanks for past favors and hoping you may have occasion for thanks on this Thanksgiving Day, we are,

Yours truly, W. M. OLER & CO.

35 Ice fell to $2.00 per ton before the season of 1880 closed. They did not offer or tender any ice after July, 1880. We made no demand.

FULLER DINGLEY, called by the plaintiffs, being sworn, testified as follows:

I am one of the plaintiffs. I was present at the conversation with my brother and Wm. H. Oler about the Barker ice-houses—about letting them a part of the ice-houses. My brother asked him what

conclusion he had come to; said he had a chance to let them—named parties and price, I think. Oler said he concluded he would not take them; would enlarge the Cedar Grove houses. My brother said he would let him have enough of our Barker houses to put up what was due us, and let him the balance of the houses. He said he chose not to come up to the Barker houses, but would enlarge Cedar Grove. I understood that room for our ice was to be free of charge. In January, 1880, my brother told Oler we had an offer for our ice in his houses, and asked him if he would like to buy. He said he did not. Asked his advice about selling, and he advised us to sell.

Cross-examination:

I told Oler we were offered 12 cents per ton. This was by Hancock & Crowell. They were to pay on capacity of building, whether they filled it or not.

Letter—Dingley to Oler—Produced and Identified, marked H–I.

GARDINER, ME., *Sept. 24th*, 1879.

Messrs. Wesley M. Oler & Co., Baltimore, Md.

DEAR SIRS: Yours of 20th was duly received, and we note
36 your complaint about delay in loading your first vessel (Carrie Bell), and say it seems to us little one-sided in Mr. Marson to hand you such an account without explanation, and if matters connected with this delay are as we now understand them from Mr. Berry, who informs us that the Bell arrived in the river on 12th, but did not get up until 13th. Sunday intervening brought it up to 15th; then there was a vessel of some 700 tons ahead, which had to be loaded from bottom tier, as it happened, taking, as you know, much more time than it otherwise would. Mr. Berry had not his dates with him, but he thinks the Bell was finished on 17th, and the B. of L. perhaps not made until the morning of the 18th; be this as it may, you observe with this explanation that there was no very unusual delay, and to our mind there is no probability that hereafter there will another occur of even half that length, for they easily load 2,000 tons per week there, and they have no large quantities sold, and in this case we hope it will turn out to your advantage that you waited instead of getting the ground tier; we understand your two cargoes to be just as nice as it possibly can be.

Messrs. C. & Co. write us that they can buy ice out of the river (but that, you know, would be pond ice) for 50 cents, "making 20 cents better than our offer." We replied, in substance, that this being the case, we would stand some concession, but could not compete in price with the pond ice, and, not caring to offer ours at less than 60, would submit to them what our ice was worth more than the pond; and perhaps if they offer 50 cents we best let them have a thousand or two tons.

Confidentially yours, DINGLEY BROS.

37 Letter—Oler to Dingley—Produced and Identified, marked H-2.

BALTIMORE, MD., *30th Sept.*, 1879.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of 24th to hand. We heard from Marson the same mail, giving substantially the same explanation as yourself regarding the delay of the "Carrie Bell."

We note your remarks about your correspondence with Cockran & Co., and now think that they will not be able to do better than fifty cents. We hoped our vessel would have been here before this, so that we could show them the quality of your ice. It would have happened especially well just now, as they have two cargoes in from Morse, and the ice is very badly struck indeed, and gives poor satisfaction. We are looking for our vessel every day.

Yours truly, W. M. OLER & CO.

And thereupon said cause was further considered by the court, and the plaintiffs requested the court, upon the facts proved, to hold and decide as matter of law as said plaintiffs have in their exceptions set forth; which the court then and there refused to do, and thereupon held and decided as set forth in their said exceptions, which exceptions the said court then and there, upon the prayer of said plaintiffs made in open court, allowed.

38 And the defendants also requested the court, upon the facts proved, to hold and decide as matter of law as said defendants have in their exceptions set forth; which the court then and there refused to do, and thereupon held and decided as set forth in their said exceptions; which exceptions the said court then and there, upon the prayer of said defendants made in open court, allowed.

And the said plaintiffs' bill of exceptions, as well as the said defendants' bill of exceptions, each so allowed and signed by the presiding judge, are then and there placed on file.

And now, after due deliberation thereon, the court finds
39 that the said defendants did promise in manner and form as the plaintiffs in their writ and declaration have declared against them, and assess damages for the plaintiffs in the sum of seven thousand three hundred thirty-five dollars and thirty-five cents ($7,335.35).

Said cause is thence further continued to April term, A. D. 1882; all which being seen and understood, it is considered by the court here, to wit, on the twenty-second day of September, A. D. eighteen hundred and eighty-two, that the said plaintiffs recover of the said defendants the sum of seven thousand three hundred thirty-
40 five dollars and thirty-five cents ($7,335.35), debt or damage, and their costs of suit, taxed at one hundred thirty-seven dollars and fifty-nine cents ($137.59)

Attest: A. H. DAVIS, *Clerk.*

Recorded from the original papers and minutes.

By A. H. DAVIS, *Clerk.*

41 *Copy of Plaintiffs' Bill of Exceptions.*

UNITED STATES OF AMERICA, *District of Maine,* } ss:

In the Circuit Court. Sept. Term, 1881.

JAMES B. DINGLEY *et al. v.* WESLEY M. OLER *et al.*

Now, after a full hearing of the evidence by the court, in accordance with the foregoing stipulation, and before judgment, the counsel for the plaintiffs requested the court to hold as matter of law—

1. That upon the legal construction of the contract made between the plaintiffs and defendants, as contained in the correspondence introduced as evidence, the said defendants had not the exclusive right of election when, in the season of 1880, they would deliver to the plaintiffs the ice in payment of the ice borrowed in the season of 1879; but that the plaintiffs had an equal right of election when to demand the ice any time during the season, and that the defendants were legally bound to deliver it when so demanded, and that a refusal to do so would be a breach of the contract, for which
42 an action could be immediately commenced and maintained, and that the market value of such ice at the time of demand and refusal would be the measure of damages, with interest, and that the demand and refusal, in July, 1880, was a breach of the contract at that time, and the measure of damages was five dollars a ton, the price agreed upon as the price of ice in that month.

2. That the legal measure of damages was the market price of ice at the time of a breach of the contract to deliver the ice.

3. That the defendants had not the right, by their contract, to the entire season in which to deliver the ice, and that the measure of damages was not the market value of the ice later in the season of 1880, but was the value at the time of refusal to deliver.

The court found, as matter of fact, that late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties
43 were dealers in ice, cutting it upon the Kennebec river, and shipping it thence during the season, that is, while the river is open.

The offers of the plaintiffs were rejected, but the defendants, by their letter of 6th September, 1879, made a counter-offer to take a cargo and "return the same to you next year from our houses." The plaintiffs by their letter of September, 1879, accepted this offer and several cargoes were deliverd upon the same terms; the total delivery was 3,245.28 tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that, delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things: "We must, therefore,

decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the price you offered other parties here (that is, 50 cents), or give you ice when the market reaches that point."

44 The plaintiffs, 10th July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery; to which the defendants answered 15th July, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contains this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," etc., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The letters above mentioned and the evidence concerning the oral demand or request are made a part of this statement. The court further found that ice was worth five dollars a ton in July, 1880, and fell later in the season to two dollars a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs and to be executed by the defendants, who were bound to deliver $3{,}245\frac{25}{100}$ tons of ice from their

45 houses on the Kennebec river during the year of 1880; that the year means the shipping season; and that the defendants had the whole season, if they chose to demand it, in which to make delivery, and that the letters of July 7th and 15th from the defendants to the plaintiffs contained an unequivocal refusal to deliver any ice during the season; that the defendants having unqualifiedly refused to ship the ice, this action can be maintained though brought before the close of the season, but that the damages are not to be reckoned by the price of ice in July; that what the plaintiffs lost was $3{,}245\frac{25}{100}$ tons of ice some time during the season; that the price of ice went down after July to two dollars a ton and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

1. By the decision of the court that the defendants had the whole of the shipping season of 1880, if they chose to demand it, in which to deliver the ice, the plaintiffs are ag-rieved and except thereto.

46 2. By the decision of the court that the measure of damages was not the price of ice in July, 1880, when a demand was made and a refusal given, the plaintiffs are ag-rieved and except thereto.

3. By the decision of the court that the price of ice when it had gone down to two dollars a ton was the measure of damages, the plaintiffs are ag-rieved and except thereto.

The writ, pleadings, and import of the evidence are made a part of these exceptions.

And in accordance with the stipulations filed in the cause the

plaintiffs present these exceptions and pray that they may be allowed.

By BAKER & BAKER,
Their Att'ys.

These exceptions are allowed.

JOHN LOWELL,
Circuit Judge.

47 *Copy of Defendants' Bill of Exceptions.*

UNITED STATES OF AMERICA, }
District of Maine, } *ss:*

September T., 1881.

JAMES B. DINGLEY *et al. v.* WESLEY M. OLER *et al.*

And now, after a full hearing of the evidence by the court in accordance with the foregoing stipulation, and before judgment, the counsel for Wesley M. Oler *et al.* requested the court to hold as matter of law:

1st. That this action cannot be maintained upon the evidence given.

2nd. That upon a legal construction of the contract made between said Oler *et al.* and Dingley *et al.*, as contained in the correspondence introduced in evidence, the said Dingley *et al.* were bound to hold said Oler *et al.* harmless and indemnified against any loss if the price of ice exceeded 75 cents per ton when a return of the same was demanded during the season of 1880, and that said Dingley *et al.* could not recover a greater sum per ton for damages.

3d. That by the terms of the contract, which is contained wholly in the correspondence, Wesley M. Oler & Co. had the entire season of 1880 within which to comply with the requirements of the contract, and that this action begun July 21, 1880, is prematurely commenced and cannot be maintained.

48 The writ, pleadings, and evidence to make a part of these exceptions.

The court found the facts to be that late in the season of 1879 the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec river and shipping it thence during the season; that is, while the river is open. The offers of the plaintiffs were rejected, but the defendants, by their letter of 6th September, 1879, made a counter-offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by their letter of September, 1879, accepted this offer, and several cargoes were delivered upon the same terms. The total delivery was 3,245.25 tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that, delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer.

July 7th, 1880, the defendants wrote repeating their objections, and saying, among other things, "We must, therefore, decline
49 to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is, 50 cents), or give you ice when the market reaches that point." The plaintiffs, 10th July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery; to which the defendants answered, 15th July, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation.

The letter contains this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," etc., asking for a reply or a personal interview.

Neither appears to have been given, and this action was brought 21st July, 1880.

The letters above mentioned and the evidence concerning the oral demand or request are made part of this statement.

The court further found that ice was worth $5 a ton in July, 1880, and fell later in the season to $2 a ton.

Upon these facts the court held as matter of law that there was a contract executed by the plaintiffs and to be executed by the
50 defendants, who were bound to deliver 3,245.25 tons of ice from their houses on the Kennebec river during the year 1880; that the year means the shipping season, and that the defendants had the whole season, if they chose to demand it, in which to make delivery; that in the month of July, when the defendants declined to furnish the ice to Dingley Bros. during that season, that a cause of action then accrued to the plaintiffs, Dingley Bros., against the defendants, Oler & Co.; that this action can be maintained, notwithstanding the season had not expired when the suit was commenced, and that the plaintiffs can recover for the whole amount of the ice at the rate of $2 per ton, which was the lowest price to which ice declined later in the season.

1. By the decision of the court that a cause of action had accrued to the plaintiffs the defendants are ag-rieved and except thereto.

2. Also, by the decision of the court that this action can be maintained the defendants are ag-rieved and except thereto.

3. Also, by the decision of the court that under a legal
51 construction of the contract the plaintiffs were entitled to recover in any event more than 75 cents per ton, the defendants are ag-rieved and except thereto; and in accordance with the stipulation filed in this cause, the defendants present these their exceptions and pray that the same may be allowed.

J. W. SPAULDING AND
W. F. LUNT,
Attorneys for Oler & Co.

These exceptions are allowed.
JOHN LOWELL,
Circuit Judge.

52 *Copy of Bond.*

DINGLEY *et al. v.* OLER *et al.*

Know all men by these presents, that we, James B. Dingley and Fuller Dingley, both of Gardiner, in the county of Kennebec, Maine, are held and firmly bound unto Wesley M. Oler and William H. Oler, both of Baltimore, Maryland, copartners under the firm name of W. M. Oler & Co., in the fall and just sum of five hundred dollars, to be paid to the said Wesley M. Oler and William H. Oler, both of Baltimore aforesaid, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at a circuit court of the United States, in the district of Maine, in a suit depending in said court between James B. Dingley and Fuller Dingley, both of Gardiner, Maine, copartners under the firm name of Dingley Brothers, and Wesley M. Oler and William H. Oler, copartners under the firm name of W. M. Oler & Co., judgment was rendered against the said James B. Dingley and Fuller Dingley for a large portion of their claim sued in said suit; and the said James B. Dingley and Fuller Dingley having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Wesley M. Oler and William H. Oler, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the fourth Monday of October next:

Now, the condition of the above objection is such, that if the said James B. Dingley and Fuller Dingley shall prosecute their writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. B. DINGLEY. [L. S.]
F. DINGLEY. [L. S.]
JAMES STONE. [L. S.]
JOSEPH BRADSTREET. [L. S.]

Sealed and delivered in presence of—
A. C. STILPHEN.

Approved by—
HORACE GRAY,
Associate Justice Supreme Court United States.

53 *Copy of Bond.*

OLER *et al. v.* DINGLEY *et al.*

Know all men by these presents, that Wesley M. Oler and William H. Oler, both of Baltimore, in the district of Maryland, copartners under the firm name of W. M. Oler & Co., as principals, and Joseph

W. Spaulding, of Richmond, district of Maine, surety, are held and firmly bound unto James B. Dingley and Fuller Dingley, both of Gardiner, in the district of Maine, copartners under the firm name of Dingley Bros., in the full and just sum of five hundred dollars, to be paid to the said Dingley Brothers, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at a circuit court of the United States held at Portland, in the district of Maine, on the twenty-third day of April, A. D. 1882, in a suit depending in said court between the said Dingley Brothers, plaintiffs, and said W. M. Oler & Co., respondents, judgment was rendered against the said W. M. Oler & Co., defendants, for the sum of seven thousand three hundred and thirty-five and $\frac{35}{100}$ dollars damages, and one hundred and thirty-seven and $\frac{59}{100}$ dollars costs of suit, said judgment being entered upon the twenty-second day of September, A. D. 1882; and the said W. M. Oler & Co. having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Dingley Brothers, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the fourth Monday of October next:

Now, the condition of the above obligation is such, that if the said W. M. Oler & Co. shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WESLEY M. OLER, [L. S.]
By J. W. SPAULDING.
WM. H. OLER, [L. S.]
By J. W. SPAULDING.
J. W. SPAULDING. [L. S.]

Sealed and delivered in presence of—
F. J. BUCKER.

Approved by—
HORACE GRAY,
Associate Justice Supreme Court United States.

54 UNITED STATES OF AMERICA, } ss:
District of Maine, }

I, A. H. Davis, clerk of the circuit court of the United Stats for the district of Maine, hereby certify that the foregoing printed and written pages contain a true and perfect transcript of the record and of all the proceedings in the cause [of] James B. Dingley *et al. v.* Wesley M. Oler *et al.*, determined in this court at the April term thereof, A. D. 1882.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this eighteenth day of October, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

55 *Opinion of the Court.*

Circuit Court of the United States, District of Maine. September T., 1881.

JAMES B. DINGLEY & *al.*
v.
WESLEY M. OLER & *al.* } No. 42.

LOWELL, J.:

This case was heard by Judge Fox and me, upon evidence taken at the jury trial, the decision of the court being substituted for that of the jury by stipulation. We had consulted upon the case before Judge Fox's lamented death, and the result which I shall state was arrived at by both of us.

I find the facts to be that late in the season of 1879 the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total lost, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec river, and shipping it thence during the
56 season, that is, while the river is open. The offers of the plaintiffs were rejected, but the defendants, by their letter of 6th September, 1870, made a counter-offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by their letter of September, 1879, accepted this offer, and several cargoes were delivered upon the same terms; the total delivery was $3,245\frac{25}{100}$ tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that, delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things, "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the price you offered other parties here (that is, 50 cents), or give you ice when the market reaches that point." The plaintiffs, 10th July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants answered, 15th July, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contains this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," etc., asking for a reply or a personal interview.
57 Neither appears to have been given, and this action was brought 21st July, 1880. The letters above mentioned and the evidence concerning the oral demand or request are made part

of this statement. I further find that ice was worth $5 a ton in July, 1880, and fell, later in the season, to $2 a ton.

Upon these facts I hold that there was a contract executed by the plaintiffs and to be executed by the defendants, who were bound to deliver 3,245$\frac{25}{100}$ tons of ice from their houses on the Kennebec river during the year 1880; that the year means the shipping season, as, indeed, I understand the correspondence to admit, and that the defendants had the whole season, if they chose to demand it, in which to make delivery.

The questions are, whether the plaintiffs had a cause of action in July; and, if so, what is the measure of damages?

It seems to me that the letters of the 7th and 15th of July contained an unequivocal refusal to deliver any ice during the season. The former letter, to be sure, speaks of shipping if ice should fall to the very low price of fifty cents, but this was under a claim of right not to ship unless it did fall to that point.

The second letter says nothing of this qualification, if such it can be called. That letter does speak of further interviews or correspondence, but I regard this rather as looking to a conference and compromise or possible understanding to be arrived at, than a qualification of the explicit refusal to ship ice that season.

The defendants having unqualifiedly refused to ship the
58 ice, this action may be maintained, though brought before the close of the season, if the doctrine of Hochster *v.* De Latour, 2 Ell. & Bl., 678, is to be followed. That doctrine is, that, in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces the contract, an immediate action will lie. Frost *v.* Knight, L. R., 7 Ex. 111; Roper *v.* Johnson, L. R., 8 C. P. 167; Crabtree *v.* Messer-Smith, 19 Iowa, 179; Holloway *v.* Griffith, 32 Iowa, 409; Fox *v.* Kitton, 19 Ill., 519; Burtis *v.* Thompson, 42 N. Y., 246; Howard *v.* Daley, 61 N. Y., 362. These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.

An able argument has been made against this doctrine by a jurist whose comparatively early death was a great loss to the cause of jurisprudence. Daniels *v.* Newton, 114 Mass., 530. I appreciate Judge Wells' argument, but he makes an admission which very much impairs its force. He says on p. 533: "A renunciation of the agreement by declarations or inconsistent conduct before the time of performance may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all right of the party so disavowing its obligations to assert rights under it afterwards, if the other party has acted upon such disavowal;" in other words, the promisee may treat the contract as rescinded, and act accord-
59 ingly in every particular except bringing an action. If the contract is rescinded wrongly by one party, I do not see why the other may not have an immediate action for the wrongful rescission, whether it be called a breach of the contract or something else. The

learned judge certainly makes a strong point when he says (p. 532) that this rule has never been applied to commercial paper, and that it may be fairly tested by so applying it. I think it highly probable that a notice by a promissor to the holder of his negotiable note, payable on a day certain, that he shall not pay it, would be treated as a mere friendly warning to be prepared for the emergency. It would be difficult to apply the rule, or to find any damages, in a case of the extreme simplicity and singleness of that supposed. But if the promissor had an election to pay at any time before a certain day, and notified his renunciation before that day, would not his election be gone? This case somewhat resembles that. The defendants might deliver the ice at any reasonable time and on reasonable notice within the season. When asked about it, they might have delivered at once, or have fixed a future day, or have declined to appoint a day at present. They did neither of these things; but said that they should fix no day, and should deliver no ice at any time. It seems to me that they ought not to be permitted to say that the renunciation was mere talk, and that the time had not come when they could do what they undertook to do, that is, reject and renounce the contract.

60 It does not follow that the damages are to be reckoned by the price of ice in July. What the plaintiffs lost was 3,000 tons at some time during the season. We should infer, in favor of the defendants, that they would have been shrewd enough and well informed enough to deliver when the price had fallen. It went down after July to two dollars a ton, and the damages must be reckoned at this rate. *Ex parte*, Llansamlet Tin Plate Co., L. R., 16 Eq., 155; Brown *vs.* Muller, L. R., 7 Ex., 319; Roper *v.* Johnson, L. R., 8 C. P., 167. Judge Fox called my attention to these cases, and they seemed to us to be well decided.

After the parties have had opportunity to except to this decision, if they should be so advised, judgment is to be entered at the rate of $2 a ton for $3,245\frac{25}{100}$ tons, with interest from the date of the writ.

61 UNITED STATES OF AMERICA, *District of Maine:*

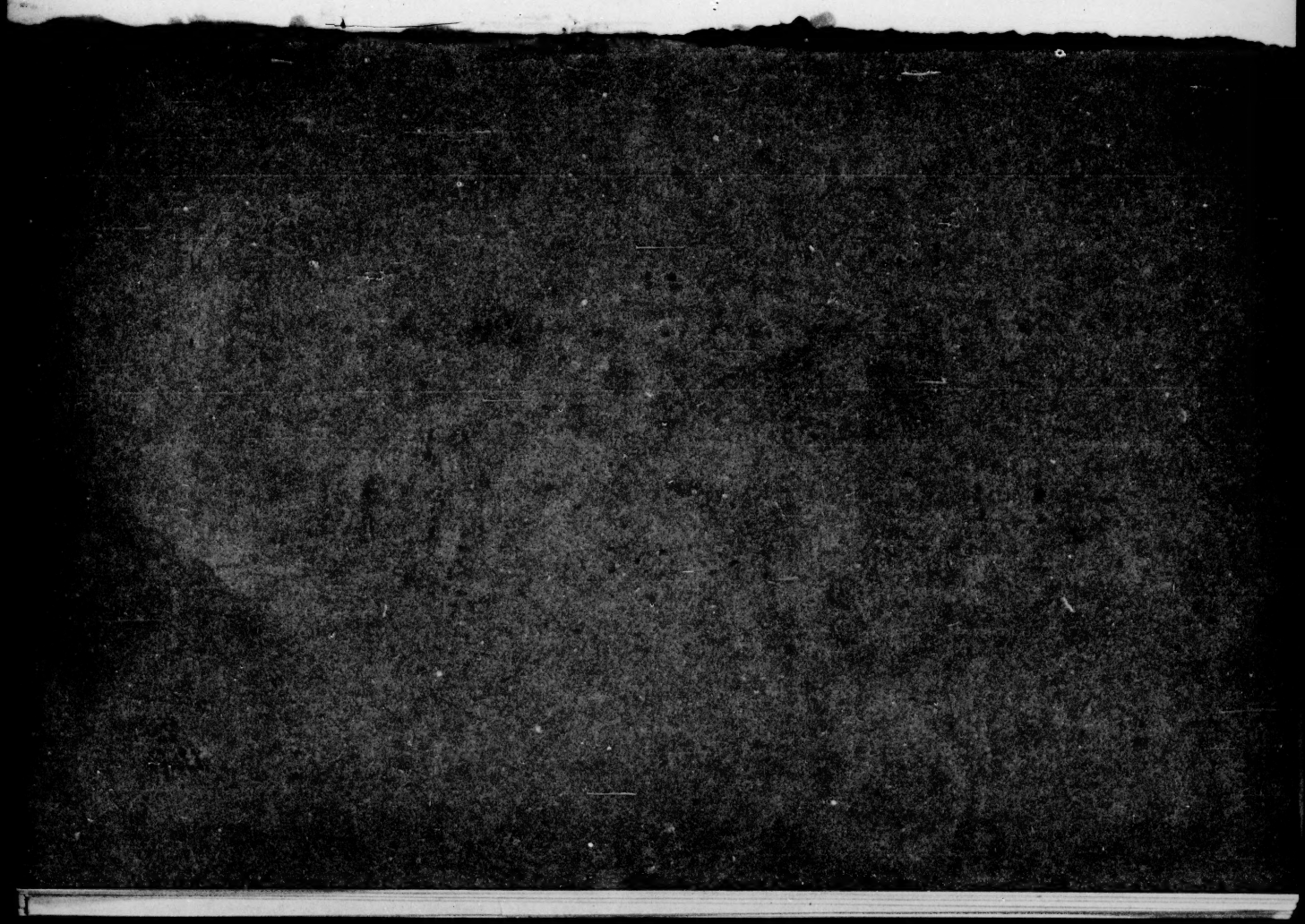
I, A. H. Davis, clerk of the circuit court of the United States for said district, hereby certify that the foregoing is a true copy of the original opinion of Lowell, J., given in the cause therein mentioned.

Witness my hand and the seal of the said circuit court, this eighteenth day of October, A. D. eighteen hundred and eighty-two.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

Endorsed on cover: Maine C. C. U. S. No. 149. James B. Dingley and Fuller Dingley, copartners under the firm name of Dingley Brothers, plaintiffs in error, *vs.* Wesley M. Oler and William H. Oler, copartners under the firm name of W. M. Oler & Co. No. 150. Wesley M. Oler and William H. Oler, copartners under the firm name of W. M. Oler & Co., plaintiffs in error, *vs.* James B. Dingley and Fuller Dingley, copartners under the firm name of Dingley Brothers. Filed 28th October, 1882.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 149. *James B. Dingley et al.*
Plaintiffs in Error,
vs.
Wesley M. Oler et al.

No. 150. *Wesley M. Oler et al.*
Plaintiffs in Error,
vs.
James B. Dingley et al.

In Error to the Circuit Court of the United States for the District of Maine.

Brief for *James B. Dingley et al.*
By Mr. ORVILLE D. BAKER.
(Mr. LESLIE C. CORNISH with him.)

STATEMENT OF FACTS.

These are cross writs of error and grow out of an action of assumpsit brought in the court below by the Dingleys of Gardiner, Maine, against the Olers of Baltimore, Maryland, for breach

of the defendants' contract to deliver to the plaintiffs three thousand two hundred forty-five and twenty-five one hundredths tons of ice, during the season of 1880. Both parties were then dealers in ice on the Kennebec river and occupied ice houses there. After the plaintiffs' evidence was out — the facts being undisputed, — a jury was waived and the cause submitted to the court below for decision, the parties reserving a right to exceptions and to a writ of error (p. 6), and judgment was rendered against the defendants for seven thousand three hundred thirty-five dollars and thirty-five cents. Both parties thereupon alleged exceptions, (Dingley's exceptions, pp. 22 and 23; Oler's exceptions, pp. 24 and 25;) and brought the case to this court by writs of error numbered on the docket 149 and 150, which will be argued together.

The contract which formed the basis of the action is contained in letters passing between the parties, appearing in the printed case, and from those letters it appears that in August, 1879, Dingley Brothers (plaintiffs below) owned a large quantity of ice which if not disposed of before the closing of the river would be forfeited to one Berry under the terms of a contract previously made with him, and August 15th they wrote Oler & Co., asking if some exchange of ice could not be made with them which would save a loss by reason of forfeiture.

(Exhibit "A," p. 7.)

This, Oler & Co., by letter of August 19, declined to do. (Exhibit "B," p. 7.)

August 27th the plaintiffs again wrote Oler (Exhibit "C," p. 7):

"We were thinking you might make an exchange with us in some way. In that case, of course we could not expect you to buy at any reasonable rate, if

at all, but thought perhaps you might ship from ours at Berry's, and let us have some in your buildings, and will ask you to do something of this kind if you make further shipments."

September 3, 1879, the defendants reply (Exhibit "D," p. 8):

"At present writing, we do not expect to ship any more ice, but if we should need one more cargo this fall, we will bear you in mind."

After some ineffectual attempts by the defendants to sell the plaintiffs' ice to other Baltimore parties they again write on September 6, 1879. (Exhibit "E," p. 9):

"We have decided to ship one more cargo, and have ordered a vessel for that purpose. It would, of course, be more convenient for us to ship this cargo from our own houses, but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you. We, of course, *do not entertain the idea of buying*, having a superabundance on hand; but *will take this cargo and return same to you next year from our houses.* We wish heavy and perfectly square ice, as this is the only kind we can use, for we want it for our oyster trade which demands this kind. *If this is satisfactory, you may show this letter to Marson as an order from us.*"

September 9, 1879, the plaintiffs replied (Exhibit "F," p. 9):

"Yours of the 6th is received, and we are very glad of the opportunity of starting a little of our ice, and you shall have the best there is, and we think you will not regret your efforts to accommodate us. From what you write we think you have in mind to load the ice yourselves. Our contract with Mr. B. is for him to pack on board, suitably dunnaged, &c.; to this we do not suppose you will object as it saves you so much funds *until another season;* and this we are willing to do and more if ice shall be worth more than seventy-five cents per ton another season. We shall give you some advantages on what you may have *of ours in your buildings* and can most likely furnish you with some room in the old buildings (Barker's) if you should need it."

September 13th, the defendants wrote (Exhibit "G," p. 10):

"Yours of 9th duly received. We find that there is going to be quite a demand for Eastern ice this fall, and we shall be obliged to use more than we calculated

on. We have ordered Messrs. Kilham, Loud & Co., to send one vessel to your place every week until further orders. We note your remarks in regard *to this exchange*, and assure you that we felt satisfied that it would all come out right in the end. * * * We have written Marson and given him necessary instructions in regard to overseeing the loading. The arrangement is perfectly pleasant to us."

September 17th, plaintiffs reply (Exhibit "I," p. 11):

"Yours of the 13th is at hand, and we are very glad you are able to ship more ice, and hope it may turn out to be considerable."

In their letter of September 17, 1879, (Exhibit "I," p. 11) the defendants say:

"We are getting *anxious* about ice and hope you will see that it is shipped as soon as the vessels arrive."

Under date of September 20, 1879, (Exhibit "J," p. 11) the defendants say:

"We have been in something of a stew over our vessel as we are now running short of Eastern ice."

September 24th, the defendants again wrote (Exhibit "H," p. 11):

"We will continue to order one vessel per week from your place for the present."

In accordance with this contract, Oler sent vessels and took from Dingley's houses — between September 18, and November 19, 1879, — seven cargoes of ice, aggregating three thousand two hundred forty-five and twenty-five one-hundredths tons, (Exhibit "P," p. 14) the quality of which the defendants themselves said was unexceptionable. (Exhibit "K," p. 12.)

In January, 1880, a conversation took place between the parties in which Dingley told Oler that the plaintiffs had received an offer for the ice and asked Oler if he did not wish to purchase it. Oler said, "No," and advised Dingley to sell to third parties this very ice put up by Oler for Dingley under this contract of 1879. (J. B. Dingley, p. 18.) (Fuller Dingley, p. 20.)

In June or July, 1880, Dingley had a conversation with Oler, junior, in relation to the delivery of the ice, in which the latter intimated their unwillingness to fulfil the contract, (p. 17) and July 7, 1880, Oler & Co. wrote Dingley in the same tone saying:

"We must therefore *decline to ship the ice for you this season* and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point."

(Exhibit "R," p. 14.)

July 10, 1880, Dingley Brothers replied expressing their astonishment at such a course, and the ruinous result to them if the contract was not complied with and made a demand on the defendants for the ice. (Exhibit S. p. 15.)

To this demand Oler & Co. made on July 15, 1880, an unqualified refusal (Exhibit F. p. 16,) saying:

"We cannot, therefore, comply with your request to deliver to you the ice claimed."

Here, then, as we claim was the breach. The ice was taken by the defendants in 1879 under their contract to return the same in 1880. July 15, 1880, they refused to deliver, and on the 21st day of July, 1880, this action was brought.

The market value of ice on the Kennebec river throughout July, 1880, when as the plaintiffs claim the breach occurred, is

admitted by the defendants to have been five dollars per ton, (p. 14) and the damages claimed are therefore the market value of three thousand two hundred forty-five and twenty-five one hundreths tons at five dollars per ton, or $16,216.25, and interest.

ASSIGNMENT OF ERRORS.

By plaintiffs.

The plaintiffs below make the following assignment of errors (pp. 22, 23).

The refusal of the court to hold as requested by the plaintiffs below before judgment:

1. "That upon the legal construction of the contract made between the plaintiffs and defendants, as contained in the correspondence introduced as evidence, the said defendants had not the exclusive right of election, when, in the season of 1880, they would deliver to the plaintiffs the ice in payment of the ice borrowed in the season of 1879; but that the plaintiffs had an equal right of election when to demand the ice any time during the season, and that the defendants were legally bound to deliver it when so demanded, and that a refusal to do so would be a breach of the contract, for which an action could be immediately commenced and maintained, and that the market value of such ice at the time of demand and refusal would be the measure of damages, with interest, and that the demand and refusal in July, 1880, was a breach of the contract at that time and the measure of damages was five dollars a ton, the price agreed upon as the price of ice in that month."

2. "That the legal measure of damages was the market price of ice at the time of a breach of the contract to deliver the ice."

3. "That the defendants had not the right by their contract to the entire season in which to deliver the ice, and that the measure of damages was not the market value of the ice later in the season of 1880, but was the value at the time of refusal to deliver."

The plaintiffs below also assign three errors in the decision of the court below:

4. "That the defendants had the whole of the shipping season of 1880, if they chose to demand it, in which to deliver the ice."

5. "That the measure of damages was not the price of ice in July, 1880, when a demand was made and a refusal given."

6. "That the price of ice when it had gone down to two dollars a ton was the measure of damages."

By defendants.

On the other hand, the defendants below assigned three errors in the decision of the court, claiming in substance (p. 25):

1. That no action had accrued or could be maintained.

2. That in any event no damages could be recovered over seventy-five cents per ton.

We will treat the assignments of errors on both sides together in the argument.

This contract can be construed in three ways:

First: That the Olers (the defendants below) had the whole shipping season of 1880 in which to return the ice and the right to elect the delivery time during that season.

Second: That the Dingleys (the plaintiffs below) had the right to elect the time of delivery during the season.

Third: That the rights were reciprocal and either party had the right to elect any reasonable time during the season.

DISCUSSION OF DEFENDANTS' ASSIGNMENT OF ERRORS.

Defendants' assignment 3.

"*Damages can not exceed seventy-five cents a ton.*"

If the action can be sustained at all—if the defendants are liable for their refusal to deliver the ice—the damage must be the market price, either at the date of refusal, or at such other time during the season of 1880 as performance was due.

But at no time during that season was ice worth seventy-five cents a ton, nor is there any pretence that the evidence shows such price. The only mention of "seventy-five cents a ton" to be found in the evidence is in exhibit "F" on page 9, where the plaintiffs say:

"From what you write, we think you have in mind to load the ice yourselves. Our contract with Mr. B. is for him to pack on board suitably dunnaged, &c. To this we do not suppose you will object, as it saves you so much funds until another season; and this we are willing to do, and more if ice should be worth more than seventy-five cents per ton another season."

But this was only an expression of what Dingley would volunteer to do if *Oler should fulfil*, and not break, his contract. It is not itself a contract, and has no consideration, and the contingency on which it was to happen never came. Still less is it any attempt to measure damages in case of breach.

We cannot believe that the defendants' counsel will press this third assignment of error.

Defendants' assignments, 1 and 2.

"*This action is prematurely brought.*"

If either the second or third construction, here suggested, of the contract is adopted, then the case becomes a simple contract by the defendants to do a thing on a day certain, a demand and refusal on that day, a consequent breach and damage, and the action is plainly sustainable, and the defendants' first and second assignments of error fall to the ground.

Even if the first construction is adopted, it can not be doubted on the cases that the action is still well brought, as was ruled by the court below.

The fact of refusal.

The court below has found that *during the delivery time* the plaintiffs demanded and the defendants *unqualifiedly refused to deliver any ice during the season* (p. 29).

To this finding no objection is taken in fact and no exception in law. Independent of the finding, the evidence on this point is abundant and is sufficiently summed up in the opinion of the court below (pp. 28, 29).

And one of the plaintiffs testifies (p. 19), "*They* (the defendants) *did not offer or tender any ice after July, 1880.*

The law under an unqualified refusal.

Even where the demand is *before* the contract time for performance has begun, a *distinct and unequivocal* refusal to perform at all, may be treated as a breach and action be brought at once. On this point we submit that the array of authority is overwhelming.

It comes from the highest courts in England, the highest courts in five of the states in this country, the United States Circuit Court in Virginia and Pennsylvania, incidentally from the United States Supreme Court, and unqualifiedly from five of the most reliable text books: Leake, Chitty, and Parsons on Contracts; Benjamin on Sales, and Sedgwick on Damages, as will fully appear from the following authorities.

(1.) It has been frequently held in the case of an executory contract that if the promisor has by *any positive act* rendered himself unable to perform his part, it not only serves to dispense with the performance of any conditions precedent on the part of the promisee before bringing his action, but also is itself a breach of the contract.

Thus in the case of a contract of marriage, if the promisor, before the time arrives, marries another, the promisee has an immediate right of action.

Short v. Stone, 8 Ad. & Ell. 358.

In this case Coleridge, J., says:

"If the defendant disables himself from fulfilling such a request, then in the first place, he dispenses with the request because it has become impossible to make the request effectually, and secondly, he has broken his own contract

because he is no longer able to fulfil that. It is no matter how long the person whom the defendant has married, lives. The contract having been once broken, the averment of a request to fulfil it is immaterial."

So in an executory contract to assign a lease, at a certain time; if before that time arrives the defendant assigns to another, the contract is at once broken.

Lovelock v. Franklyn, 8 Ad. & Ell. 371.

Ford v. Tiley, 6 Barn. & Cr. 327.

Heard v. Bowers, 23 Pick. 455.

Kenerson v. Henry, 101 Mass. 152.

In Ford v. Tiley, *supra*, Bagley, J., said:

"We are of the opinion that the action is maintainable because by lease of June, 1825," (made to a third party before the arrival of the time for making one to the plaintiff), "the defendant has given up his right to have the possession and has put it out of his power, so long as the lease of 1825 subsists, to grant the lease he stipulated to grant. It is very true the defendant may obtain a surrender of that lease before midsummer, 1827," (the time mentioned in the contract with the plaintiff), "and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are that when a party has disabled himself from making an estate he has stipulated to make at a future day by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation and is liable to be sued before such day arrives."

And such is the law as laid down by the leading text writers on the subject.

Leake on Contracts, p. 460.

2 Chitty on Contracts, p. 1067.

2 Parsons on Contracts, p. 667.

Benj. on Sales, § 567.

(2.) We also maintain that when one party to an executory contract absolutely refuses to perform his contract, and before

the time arrives for performance distinctly and unqualifiedly communicates that refusal to the other party, that other party can, if he choose, treat that refusal as a breach and commence an action at once therefor.

The authorities substantiating this principle are numerous and we propose to notice them somewhat in their chronological order, citing first the authorities in England, and then those in the United States.

a. *The doctrine in England.*

In the case of

(1841) Philpotts v. Evans, 5 M. & W., 475,

there are certain remarks by Baron Parke to the effect that there can be no breach of an executory contract or action brought for such breach before the arrival of the time at which by its terms it is to be performed. But those remarks are mere dicta.

As Lord Campbell said, in

(1851) Cort v. Ambergate R'y Co., 17 Q. B. 127,

referring to the case of Philpotts v. Evans:

"The only question at the trial was as to the time with respect to which the damages were to be calculated. The market having continued to fall from the day of the contract till the bringing of the action the defendant sought to take advantage of his own wrong, and to calculate the damages according to the price in the market on the 26th of January, when he gave notice that he intended to break the bargain; but it was very properly held that the plaintiffs were entitled to damages according to the market price when the wheat was tendered to the defendant for acceptance. The court cannot be considered as having decided that if the notice had been received by the plaintiffs before the wheat was sent off from Gloucester, the plaintiffs might not *at their pleasure have treated it as a breach of the contract* and commenced an action against the defendant for not accepting it, without tendering it to him at Birmingham."

In 1853 the precise question involved in the case at bar, arose in England in the case of

Hochster v. De La Tour, 2 Ell. & Bl., 678.

The facts of the case were these:

The plaintiff made a contract with the defendant by which the former was to enter into the service of the latter as a courier, on the 1st of June, 1852. Before that day arrived the defendant notified the plaintiff that he should not fulfil his contract, and would not employ the plaintiff. The plaintiff thereupon, before the 1st day of June, commenced an action against the defendant for breach of contract.

And the question before the court was whether the action was prematurely brought.

Lord Campbell delivered the opinion of the court, and after a very careful review of the decisions, laid down the law as follows:

"The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudical to the wrongdoer."

This case of Hochster v. De La Tour, is the leading authority upon the subject, and establishes the doctrine squarely and firmly that the promisee may, if he choose, after a refusal by the promisor to perform, bring his action for breach of contract, before the arrival of the day of performance.

In 1861 the question again arose in the case of

Danube, &c. R. R. Co. v. Xenos, 11 C. B., N. S. 152.

In the course of his opinion Chief Justice Earle noted his approval of the decision in Hochster v. De La Tour, in these words:

"I am of the opinion that the law has been well laid down in the cases referred to on the part of the plaintiffs, that when a contract is for the performance of a thing on a given day, it is competent for the party who is to perform it to declare that he will not perform it and then the other party has the option of treating that as a breach of the contract."

In 1870, in the case of

Frost v. Knight, L. R., 5 Ex., 322,

the doctrine of Hochster v. De La Tour was somewhat doubted. In that case there was a contract of marriage, the defendant promising to marry the plaintiff as soon as his father died. While his father was still living the defendant informed the plaintiff that he should never marry her. Thereupon the plaintiff brought an action for breach of contract, and the court of Exchequer held that the case of Hochster v. De La Tour, though it must be held to govern mercantile contracts should not be extended to contracts of marriage.

The case was carried to the court of Exchequer Chamber, and in 1872, the higher court, (L. R. 7 Ex. 111), reversed the decision of the Exchequer Court, and affirmed the doctrine of Hochster v. De La Tour in the most emphatic language.

Cockburn, C. J., said:

"The doctrine of these cases is, 'The promisee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party as responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudia-

tion of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it."

"The considerations on which the decision in Hochster v. De La Tour is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents including non-performance at the appointed time, as by an action being brought at once; and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated. * * It is therefore quite right to hold that such an announcement *amounts to a violation* of the contract *in omnibus* and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly."

The point then is well settled in England, that when the promisor has absolutely refused to perform his contract and notified the promisee that he does not intend to perform it, the promisee may elect either to waive that and treat the contract as continuing, or he may take the promisor at his word, treat it as a breach and at once bring his action therefor.

b. Upon an examination of the *American decisions* upon this point we find that the courts of many of the States have accepted and affirmed the doctrine of the leading case of Hochster v. De La Tour before cited.

In Iowa the question arose in *1865* in the case of

Crabtree v. Messersmith, 19 Iowa, 179,

and the court in delivering the opinion said:

"The rule of law is well settled that if before the time of performing the contract arrives, the promisor *expressly renounces* the contract, the promisee

may treat this as a breach of said contract and may at once maintain an action in respect thereof."

In 1871, the Iowa court again had occasion to pass upon this question in the case of a breach of promise of marriage, the action having been commenced before the time for performance arrived.

Miller, J., in the course of his opinion said:

"The rule announced in Crabtree v. Messersmith, *supra*, we deem sound and just and too well settled to be now called in question. It is not that if before the time for performing the contract arrives, the promisor *expressly renounces* the contract that this constitutes *a breach* of the contract, but that in case of such renunciation by the promisor, the promisee *may treat this as a breach and may at once maintain an action in respect thereof.*

"Not that such renunciation prior to the time for performance *is a technical breach*, but that the party injured may so treat it and bring his action at once for the injury. The rule is founded upon correct principles of justice.

"Taking the case before us for an illustration, if the plaintiff could not have brought her action until the full time in which the contract was to be performed, the defendant might have disposed of his property and left the State, and as the evidence tends to show, he had intended to do. An action brought after he should thus leave the State would afford the injured party no remedy. To require her to thus wait would be a mockery of justice."

Holloway v. Griffith, 32 Iowa, 409.
S. C. 7 Am. Rep., 208.

The same decision was rendered in *Illinois* in *the case of*

(1858.) Fox v. Kitton, 19 Ill. 519, and

(1866.) Chamber of Commerce v. Sollitt, 43 Ill., 519,

both of which cases cite with approval the leading case of

Hochster v. De La Tour, *supra*.

In 1873 the *District Court of the City of Philadelphia*, in the case of

Mountjoy v. Metzger, 12 Am. L. Reg. 442,

affirmed the doctrine of Hochster v. De La Tour and Frost v. Knight, *supra*, and concluded by saying:

"The doctrine may therefore be regarded as established in England, and from its intransic reasonableness will, in all probability, prevail in the United States."

In Maryland, (1872), a similar decision was rendered in

Dugan v. Anderson, 36 Md. 567.
S. C. 11 Am. Rep. 509.

In *New York* the question has arisen in two recent cases, both affirming the principle that we are maintaining.

In 1870, in Burtis v. Thompson, 42 N. Y. 246,
S. C. 1 Am. Rep. 516.

In 1875, in Howard v. Daley, 61 N. Y. 362,

Chancellor Dwight, after thoroughly reviewing the authorities, concludes as follows:

"On the other hand, if the defendant rejected the services of the plaintiff before the time for the performance arrived, she had an election either to consider his act as a breach of an implied contract with her, to take her into his service and bring an immediate action, or to wait till the appointed day arrived and then be in readiness to render her services."

But the case going off on another point, the rest of the court did not express any opinion upon this branch of the case.

In the *Circuit Court of the U. S., E. Dist. of Virginia*, the question arose in 1874, in

Hancock v. N. Y. Life Ins. Co. 13 Am. L. Reg. 103,

and there was a *nisi prius* ruling in favor of the principle of Hochster v. De La Tour.

In Missouri Furnace Co. v. Cochran, Adm'x,

U. S. C. Ct. W. D. Penn. Rep. Vol. XII, p. 520,

a case decided August 21, 1881, Acheson, J., in the course of his opinion said:

"And indeed it is a most rational doctrine, that a party, whether vendor or vendee, may stand upon his contract and disregard a notice from the other party of any intended repudiation of it. If this were not so, the party desiring to be off from a contract, might choose his own time to discharge himself from further liability.

"The law as to the effect of such notice is clearly and most satisfactorily stated by Cockburn, C. J., in Frost v. Knight, L. R. 7 Ex. 112."

And the same doctrine has been affirmed in the Circuit Court of the U. S. for the District of Massachusetts.

Ex parte Pollard, 2 Lowell, 411.

In the *Supreme Court of U. S.* in 1872,

Smoot's case, 15 Wallace, 36,

the general principle we are contending for seems to have been recognized and approved. Mr. Justice Miller, cites Mr. Benjamin's statement of the law in Benjamin on Sales, § 568, where he says:

"A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it *must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such* by the party to whom the promise is made."

And again, Justice Miller says:

"Though some of the judges in the case of Hochster v. De La Tour disapprove very properly of the extreme ground taken by Baron Parke, (in Phillpotts v. Evans), they all agree that the refusal to accept on the part of the defendant in such case, must be absolute and unequivocal and must have been acted on by the plaintiff."

He thus plainly intimates that when there is an absolute refusal to perform, the plaintiff can treat the contract as broken.

We would also cite the following leading text books, which declare the same principle to be true.

Leake on Contracts, p. 462.

Benj. on Sales, p. 518.

2 Chitty on Contracts, 11th Ed. p. 1067.

2 Parsons on Contracts, p. 666.

Sedgwick on Damages, p. 419, note.

(3.) Such then we find to be the law in the case of a bilateral contract—that is, a contract where both parties are bound, and where the consideration of each promise is the promise of the other party.

But the principle applies with much more reason in the case of a unilateral contract—as is the one at bar—one party having already performed the consideration, and the other being alone bound.

Thus in the case at bar, the consideration of the defendants' promise to deliver the plaintiffs a certain quantity of ice during the next year was not a promise by the plaintiffs to deliver a certain quantity to the defendants, or to pay them a certain price therefor, but the actual delivery of the ice by the plaintiffs to the defendants. The plaintiffs have actually performed their part of the contract, and have delivered the ice to the defendants, and the defendants now alone are bound.

From the very nature of the contract, then, the plaintiffs having actually delivered their ice to the defendants, and nothing more remaining to be done by them, the absolute refusal by the

defendants ever to perform the contract on their part, should be treated as a breach of the contract, if the plaintiffs so choose to consider it.

Masterton & al. v. Mayor of Brooklyn, 7 Hill, 61.

Dugan v. Anderson, 36 Md. 567.

s. c. 11 Am. Rep. 509.

In the latter case the distinction was noted by the court, although the facts in that case were that the consideration had been only partly performed by the plaintiff, while in the case at bar it had been fully performed.

Judge Miller alluded to the point in these words:

"The case of Hochster v. De La Tour relates simply to cases where there is a pre-contract for future services, or the performance of some act or duty at a future period, and when performance cannot be commenced and was not by the contract contemplated until that period arrives, and where the promisor prior to that time announces his intention not to abide by the contract.

But in this case, performance of the contract had been commenced, and the plaintiff was discharged by the defendant and prevented from further executing it, and suit was not brought until after this discharge, though before the time of performance had arrived.

The defendant broke up the contract while it was being performed by the plantiff, and the action was not commenced until after this breach. In this respect there is a broad distinction between the case before us and that of Hochster v. De La Tour."

Many other cases might be cited, but it cannot be necessary.

Our conclusion then, is that when the defendants in the case at bar wrote to the plaintiffs on the 7th of July, 1880, (p. 18), "We must decline to ship the ice for you this season," and again on the 15th of July, 1880, (p. 20), "We cannot, therefore, comply with your request to deliver you the ice claimed," the plaintiffs were warranted in treating this as a breach of the

contract, and were entitled to bring their action at once. Under any construction, therefore, of the contract here, the defendants' exceptions must fail.

DISCUSSION OF PLAINTIFFS' ASSIGNMENTS OF ERROR.

Assignments 2 and 3.

Measure of damages:

At what time shall the damages be measured under each of the three theories of construction? We say *at the time of demand and refusal under either theory.*

I.

The theory that the defendants below had the right to elect the delivery time during the season.

The learned Judge below adopted this theory of the contract, found as a fact that the plaintiffs below duly demanded the ice in July, 1880, that the defendants below then unqualifiedly refused to deliver the ice at any time during the season and that ice was then worth five dollars a ton (p. 29); and then on the supposed analogy of certain English cases (*Ex parte* Llansamlet Tin Plate Co. L. R. 16 Eq. 155; Brown *v.* Muller, L. R. 7 Ex. 319, and Roper *v.* Johnson, L. R. 8 C. P. 167,) held that as ice fell to two dollars a ton before the season closed he "should infer, in favor of the defendants, that they would have been shrewd enough and well informed enough to deliver when the price had fallen." We submit that the principle of the English cases cited cannot reduce the damage measure here.

1. Because there is no sufficient evidence in the case that the plaintiffs could as a *matter of fact* have replaced their 3245 tons of ice at two dollars a ton or at any price under five dollars a ton.

The only evidence upon the point is in a single sentence on page 19. James B. Dingley there testifies that "ice fell to two dollars per ton before the season of 1880 closed." The shipping season on the Kennebec closes about November. It appears by the evidence (p. 14) that the defendants the year before had been two months in shipping from the plaintiffs' houses the same quantity of ice. But the evidence here does not show whether ice fell to two dollars a ton, a day, a week, or month before the season closed; whether it was in time for 3300 tons of ice to be actually purchased and shipped before the river closed or in time to leave it salable if shipped.

The evidence utterly fails to show that the plaintiffs could have obtained at less than five dollars a ton, either in quantity or time, the ice required to make good the defendants' contract; and even by the English cases relied on, the measure of damages is *presumptively* the value at the time of refusal, and it is incumbent on the defendants to show affirmatively and clearly that the plaintiffs could have actually replaced the property at a less value and at a time beneficial to himself. See especially opinion of Mr. Justice Grove in Roper v. Johnson, L. R. 8 C. B. 167.

2. *As matter of law* the English cases cited are not applicable here. Their principle is not, we submit, as the learned Judge below suggests, that it would be "inferred in favor of the defendants that they would be shrewd enough to deliver at the lowest price of the season":

First, because no man can foretell when the lowest price will be;

Second, because the law will not presume intention to deliver at the lowest price where the very basis of the action is his unqualified and unretracted refusal to deliver at all. But the principle of the English cases is, that where the refusal is *before the delivery time has begun* the price at the time of refusal will still be *presumptively* the measure of damage, but the defendant may show in mitigation that when the delivery time agreed upon actually arrived the price was less and the plaintiff might have actually replaced his property at this less price.

In seeking to apply these cases here the learned Judge was misled by a false analogy. The distinction is plain. Those are all cases of property deliverable in installments; for instance, in May, June, and July, equally, and then demand is made for the May installment and the defendant refuses absolutely to deliver either that or the future installments, and suit is brought, and in some cases the cause tried, before June begins. There as to May only, the breach is actual and complete. As to June and July, it is constructive. As to May, the damages are fixed by the price at demand and are unchangeable. As to June and July, they are subject to mitigation. As to the latter, demand and refusal are *before the delivery time has begun*. In the case at bar, the demand and refusal are *in the midst of the delivery time contracted for*. If the defendant agrees to do a thing on a day fixed and the plaintiff demands performance *before* that day he has no right at all to it under his contract, and the defendants' refusal can be at best only a *constructive* breach, and the damages must still be, as in the English cases, the price at the time agreed upon for performance. But if the defendant has his election between two days and the plaintiff demands on either of them, he has a right *by his original contract* to performance on that day, *provided the defendant assents*, and that assent may

be either express or implied. And it is necessarily implied when the defendant *without objection as to date of performance*, refuses unqualifiedly to perform at all. Suppose A had contracted to deliver one hundred shares of stock to B and by express agreement had his election to deliver January 1st, 1882, *or* January 1st, 1883, and B had demanded January 1st, 1882, and A had said in terms, "I assent to the time you select. I would deliver now, if ever, but I repudiate the contract and deny your right to any delivery, present or future." Has A not thereby made his election and agreed on January 1st, 1882, as the delivery time, and must not the damages be measured by the price on that day? Or suppose A replies "I waive my right to elect the time of delivery, but I refuse on other grounds ever to deliver;" has not A forever exhausted his power to elect? And can he set it up after, to reduce damages in a suit for his wilful breach? Or suppose A's option was to deliver one hundred bushels of corn *or* of wheat on a day fixed, and B called for wheat and A said, "I make no objection to your choosing wheat, but I shall never deliver either." Would not the damages be the value of wheat and not of corn? We submit that the rule is the same whether the defendant has the right to elect one of two days or things only, or one of many, as where he may elect any day out of an entire season, for performance.

But if by *express* words the elector, while repudiating his contract, may thus fix his election and his damages, may he not fix both equally by *legal implication* from his words? And when he bases his refusal solely on his intention to repudiate the contract *in toto* and makes *no objection on the ground of his election*, does not the law imply his assent to the time or mode of performance elected by the other? If not, how can the action be sustained?

And this assent, once given or implied, can never be recalled or changed. Whether treated as a *waiver* or an *exercise* by the defendant of his election — once made, it is made forever. His assent to the day or mode of performance demanded — that being *one* of the days or modes *originally agreed on* by the parties — makes that the *very day and mode originally agreed on, as if no other had ever been named.* And the damages then follow as a matter of course, and must be measured by the price *on that day* and on no other, because that has become the fixed day of performance, and prices subsequent to that day become as immaterial as in a simple contract to perform on a day certain and a breach on that day. Especially is this true where the evidence shows, as here, that the defendants "*did not offer or tender any ice after July, 1880*" (p. 19). They had elected their time, and were content to abide by it. If one having the right to elect as to time or mode of performance breaks his contract on other grounds, but is satisfied with the time or mode demanded, why should the court be dissatisfied? Why should they make for him a defense which he himself never made during the lifetime of his contract? If he had relied on his election he should have said so then and cannot now. And if the court need interfere, or, as the learned Judge below has it, "infer," at all, why should it be to shield the wrong doer? Why should it be *against* him who has wholly kept his contract, in order *to favor* him who has wilfully broken it?

Especially is the defendant *estopped* to deny or recall his assent when, *as here*, the plaintiff relying on it has accepted that as the day of breach and acted on it to his own hurt, by bringing suit and incurring expenses and settling his own outstanding contracts with Hancock & Crowell for the ice (page 18.)

In Mountjoy v. Metzger, 12 Am. Law Register, 442–46, the court say: (District Court of Philadelphia.)

"It may well be that a purchaser who has announced that he will not pay the price, may change his mind and claim the goods if they are still on hand when the day arrives and susceptible of delivery. If this is conceded, it must follow that such a retraction on his part, would preclude a recovery by the vendor who could not be entitled to damages in the absence of loss. But the case is widely different where the goods are sold in consequence of the purchaser's declaring he does not want and will not pay for them. The transaction is *then brought to a point which does not admit of a change;* and as the damages are then liquidated, it would obviously be unjust to delay the remedy. * * * But an unqualified refusal on his part, (buyer's part), *is an irreparable breach which leaves no room for a subsequent change of purpose.*"

"In the present case, however, we are not left to inference, because the question whether goods should be sold at private sale, was put to the defendant and answered affirmatively. He is therefore *estopped from alleging that it was the duty of the plaintiff to wait till the next day before treating the contract as determined.*"

And in Swain v. Seamens, 9 Wall. 274, this court by Mr. Justice Clifford, say:

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

But we submit that it follows as a logical necessity *from the opinion of the learned Judge below*, that the breach was actual and complete on demand and refusal in July, 1880, and therefore the measure of damages must be five dollars a ton.

The learned Judge thus states his ruling on the law, p. 29:

"Upon these facts I hold * * * * * that the defendants had the whole season *if they chose to demand it*, in which to make delivery."

Suppose we admit this just as stated, "*if* they chose to demand it," we have already shown, and on the evidence it cannot be denied, that the defendants did *not* choose to demand the whole season but refused on other grounds and therefore waived their election forever.

And on this we contend that the further language of the Judge below (page 30) is most significant and indeed decisive:

"But if the promisor had an election to pay at any time before a certain day, and notified his renunciation before that day, *would not his election be gone?* This case somewhat resembles that. The defendants might deliver the ice at any reasonable time and on reasonable notice within the season. When asked about it, they might have delivered at once, or have fixed a future day or have declined to appoint a day at present. They did neither of these things, but said they should fix no day, and should deliver no ice at any time. It seems to me that they ought not to be permitted to say that the renunciation was mere talk and that the time had not come when they could do what they undertook to do, that is, reject and renounce the contract."

II.

The theory that EITHER *party had the right to elect the time of delivery during the season of 1880.*

Much may be said in favor of this construction.

The contract is contained in Exhibit "E," (p. 9) which is a letter from Oler & Co., to Dingley Bros., dated September 6, 1879. This letter relates to the first cargo but it is conceded that all the subsequent cargoes taken by the defendants from the plaintiffs were under the same contract and terms and the learned Judge correctly so finds as a fact, (p. 28). The language of the letter is:

"We have decided to ship one more cargo and have ordered a vessel for that purpose. It would, of course, be more convenient for us to ship this cargo from our own houses, but remembering past favors we feel inclined

to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you. We of course do not entertain the *idea of buying*, having a superabundance on hand but will *take this cargo and return same next year from our houses*."

DEFINITION OF THE CONTRACT.

This contract is a *Mutuum*.

Story on Bailments, § 6.

It is familiarly known in the ice business as a borrowing of ice but it is not strictly a *Commodatum*, for the borrower does not return the identical thing borrowed, but other ice of like quantity and quality.

It is called by the parties in their correspondence an "exchange.'

[Exhibits ("A," p. 7,) ("C," p. 7,) ("E," p. 9,) ("G," p. 10,) ("S," p. 15,)] but it is not strictly an *exchange*; for an exchange implies the returning of articles different in *kind*.

1 Addison Contracts, 519.
1 Chitty Contracts, 517.
Com. v. Clark, 14 Gray, 371, 372.

It is strictly a *Mutuum*.

A *Mutuum* is a bailment wherein the goods lent are to be consumed and repaid in goods of the same quality and kind.

It is a gratuitous bailment.

Story on Bailments, § 6.
Bouvier's Law Dict. "*Mutuum*."
1 Addison Contracts, 517.
Dane's Abr. Index, h. t.
Chase v. Washburn, 1 Ohio St. 244.
S. C. 59 Am. Dec. 626.

CONSTRUCTION OF THE CONTRACT.

After an extended examination, I can find no decided case where this precise question has been raised and determined.

In some of the English cases already referred to, it is assumed that where property is to be delivered in monthly installments, the seller has the right to the whole of each month, and the damages will be measured by the price on the last day of the month.

But those cases plainly do not govern this.

1. Because the point as to which party had the election of the delivery time within the month, or as to the effect of demand and refusal *within the delivery time* to determine any election, was not raised or discussed, or, for the most part, even involved.

2. These are cases not of one entire breach, but of several partial breaches.

3. In many of the cases the demand was *before the delivery time had begun*. In others, there was no definite evidence as to the terms of the demand or refusal, or as to the value at date of refusal, in distinction from that on the last day of the installment period, and the court merely assume the last day as the one on which the damages are to be measured, *in the absence of any sufficient evidence that either party had elected any different day*.

4. Even if this precise question had been reserved, argued and decided in those cases, the construction of every contract is governed by its own special evidence, internal and external. Each contract is a law unto itself.

5. Especially will it be remembered that those were *sales*,

while this is a *Mutuum*, designed only for mutual accommodation, and in a sense gratuitous.

The nature of the thing dealt in its perishability, its short and fluctuating season of value, the mode of its sale, the usages and necessities of the business — all show that to construe this contract as giving the defendants an exclusive election during 1880, would be a practical nullification of the contract itself.

We are left, therefore, in this case, largely to principle, with little help from authority.

This contract is to be construed in a reasonable manner in view of the nature of the contract, and the circumstances in the contemplation of the parties at the time it was made. It is not a contract to be performed at a specified time, nor within a given time with a day fixed for its termination, as within six months or a year. In the decided cases that may be relied upon on the other side, it will be found, we think, that some definite time is fixed in which the party must perform his contract, and therefore he has the whole time in which to do it.

But in the case at bar, there is no *definite* time fixed by the contract.

The *language* is important. It is to return "next year," not "*during*" or "*within*" next year. It contemplates, not a running or continuous delivery over the whole year, but a delivery at substantially *one* time during the year, and that time not definitely fixed. It cannot be taken literally. It says next year, but no one could claim that a delivery would answer January 1, 1880, before the river opened, or December 31, 1880, after it had closed. An ice contract is *sui generis* and cannot be construed without special reference to all the peculiar-

ities of the business and the intention of the parties. Thus construed, "next year" must mean next *ice*, or *shipping season*.

It was the ice season of 1880. When does that season begin? When the Kennebec river is open to navigation in the spring. This time is entirely uncertain and variable and is never the same two years in succession. It generally comes in April, but sometimes in March. Whon does the season end? When the Kennebec is closed to navigation in the fall and not before. That time is as uncertain and variable as the time of opening in the spring. No mortal man can know when it will come. The defendants could never know when the last day for them to deliver the ice, would come. The plaintiffs would never know when to be ready to receive it. It was in contemplation of all these elements of uncertainty that this contract was made and both parties so understood it; and it never could have been in the contemplation of either party that the defendants should have till the last day of open navigation, and the last business hour of that last day to deliver the ice, even if they could find out when that would be. For the ice delivered at such a time would be utterly useless to the plaintiffs, because the navigation would be closed that night and the ice could not be shipped, and they might have no place to store it during the coming winter. This ice was to be shipped, and the defendants knew it, and they knew it could not be shipped till the plaintiffs furnished vessels.

It is surely reasonable and consistent with the nature of the case to hold, that it was to be delivered at any time *during the season*, when the defendants elected to deliver it, and also at any time *during the season* when the plaintiffs demanded it, and that it was not the *exclusive* right of the defendants to elect the time, but that the plaintiffs had an equal right to demand its delivery, and that in this respect either party could move first. This

contract should be so construed as to prevail rather than perish; to be beneficial to the plaintiffs rather than disastrous; reasonable and useful to both parties, and not place it in the power of either party to inflict a loss or damage or fraud on the other. We claim therefore that this contract is to be construed, that the plaintiffs had a right to demand the ice at any time during the ice season of 1880, and the defendants were then bound to deliver it; and if they refused, it would be a plain breach of their contract, and that they had no right to claim the whole season, the last day and the last business hour of that day; and that this case does not come within the principle of the cases where there is a fixed limit of time for the delivery.

This is the construction adopted in a similar contract of borrowing on the Kennebec River by one of the ablest judges of the Maine Supreme Court, Mr. Justice Libbey, who was personally familiar with all the peculiarities of the ice business. The case is

Bradstreet v. Rich, 72 Maine, 233.
S. C. 74 Maine, 303.

and is reported upon other points, neither party excepting to the charge upon this point, which is as follows:

"The plaintiffs claim that the first two cargoes, the Maggie Ellen and the Alcora, were loaded by them in return for the cargo of the H. D. May which they borrowed of the defendant on the 25th of July. The receipt which they gave for that cargo is in evidence before you. By it the plaintiffs bound themselves to load the same quantity received by them as the cargo of the H. D. May, 434 tons and some pounds, for the defendant. The time is not specified. The first question that arises here is whether any of these five cargoes taken by McCausland were

taken by the authority of the defendant and on his account. If they were, if the defendant authorized the placing of those vessels at the plaintiffs' ice house to load, I instruct you that the plaintiffs had a right to load the first cargoes in payment of the ice which they borrowed, the cargo of the H. D. May. The plaintiffs had a right to elect to return that ice at the first opportunity. The defendant had a right to elect to require them to return it at the first opportunity. The very nature of the business is such that this right arises between the parties. Because, if the plaintiffs had a right to decline to deliver when requested, it might result that they would decline until the ice was very low, so that it would hardly be worth shipping. On the other hand, if the defendant had a right to decline to receive, he would have a right to refuse to receive until the ice had appreciated in the market and become much more valuable than at the time when it was borrowed. So that either party at the first reasonable opportunity had a right on the one side to deliver the ice in accordance with this contract of borrowing, and on the other to require the delivery."

If this position is correct, then in July, when the plaintiffs called for their ice and tendered the vessels, and they were refused, that would constitute a breach of the contract and the damages must be measured at that time.

III.

The theory that the plaintiffs had the right to elect the delivery time during the season.

The true construction of the contract in suit gives the plaintiffs, and not the defendants, the election of the time of delivery *during* the season, to be exercised, of course, in such reasonable manner as not to be burdensome to the defendants.

The plaintiffs have the election.

The delivery time being "next year" the *plaintiffs* have the right to elect any reasonable time within the year, i. e. within the shipping season.

A.

Because under this contract they are the moving party, — the "first agent," as Lord Coke has it,— the one to do the first act.

Coke Litt. 145, a.

That the plaintiffs are the moving party follows from the following reasons.

1. By the legal construction of this contract the defendants were not to fetch the borrowed ice back to the plaintiffs but the plaintiffs were to go and get it at the houses of the defendants, and that was the place of delivery. It was a contract for *articles in bulk* and *cumbersome*. With such cumbersome property when no place of delivery is specified they are held to be deliverable only at the place where stored or manufactured.

"As to the *place* where delivery is to be made when nothing is said about it in the bargain, it seems to be taken for granted almost universally that the goods are to be at the buyer's disposal, at the place where they are when sold."

Perkins' Ed. Benj. Sales, § 682.

2 Kent's Com. 505.

"Where an existing chattel is contracted for, in the absence of provision for delivery elsewhere, the buyer should come to receive it at the place where the goods are when purchased, and it is sufficient for the seller to be ready to deliver it there."

Corbin's Ed. Benj. on Sales, note 23, § 896.

Smith v. Gillett, 50 Ill. 290.

Ragland v. Wood, 71 Ala. 145.

S. C. 46 Am. Rep. 305.

But here the contract expressly stipulates that the delivery shall be "from Oler's houses" and this is itself a *specification by the parties* of the place of delivery and does not leave it to legal inference. The contract was therefore the same as if the Olers had said "we will take ice from your houses this year and you may take the same amount from and at our houses next year." In 1879 (the first year) Oler had to go after the ice and therefore had the election of time. In 1880 (the second year) Dingley was to go after the ice and therefore must have the same election. In other words the returning in 1880 was to be the same as the taking in 1879. Any other construction would impose a burden on the plaintiffs which the defendants had never borne, and make a contract designed for the equal accommodation of both parties, into a contract imposing only hardship upon the plaintiffs.

The "returning" of the ice by the defendants spoken of in their letter of contract (Exhibit "E,") means therefore a mere readiness to return. It is passive and not active. It requires them to have the requisite amount of ice in their houses ready to deliver, but requires the plaintiffs to go after it and get it.

For this reason the plaintiffs are the first party to act.

The language of the contract that the ice is to be returned "from Oler's houses" is important upon this. If by the contract the defendants could have furnished the ice from other houses, or have bought it in open market, they might possibly then be held the *first actors* at their option.

But they were confined by the contract to a delivery of their own ice from and at their own houses and after the ice was put up they had nothing to do except to keep it there and be ready to deliver it there when called on.

2. In the second place, the plaintiffs are the "moving agent" because under this contract, they, and not the defendants, are to furnish vessels.

a. Because in the absence of express agreement a *Mutuum*, like a *Commodatum*, is gratuitous, and hence the lender merely permits the borrower to come and get so much ice at the borrower's charge, and the lender is to retake at his own charge. Neither is to be at any expense in the first instance, but each agrees simply to appropriate so much ice in his own houses to the other's use, if he chooses to come and get it. Any other construction would impose burdens on the party giving the accommodation in the first instance.

Story on Bailments, § 219.

b. Because the place of delivery being, as we have seen, the defendants' ice houses, the getting of the ice is necessarily and as matter of law, at plaintiffs' charge.

And they must first name the vessel and give notice of their readiness to receive the ice. Until this is done, there is no duty on the vendor to deliver. *When this is done*, must not the duty arise at once? Or is this furnishing the vessel a mere idle ceremony?

The case of Walton and al. 2 Black, 5 Del. 149, is a strong case in point.

The court held:

"Where by the terms of the agreement the vendor was to sell and deliver on shipboard at his place of business ten thousand tons of merchantable ice in equal parts, during the months of May, June and July, then next ensuing, properly packed for a voyage from the state of Maine to Wilmington, Delaware, where the purchaser resided, at a price per ton stipulated in the contract, the purchaser must first name the ship and give the vendor notice of his readiness to receive it on board of her at the place of shipment."

c. Because this is the universal and notorious usage of the ice business, of which the court, as experienced men acquainted with affairs and with practical business methods, will take notice.

d. Because the evidence in this case shows affirmatively that the borrower provided the vessels when he was getting the ice, [(Exhibits), (E. p. 9), (G. p. 10), (H. p. 11), (I. p. 11), (J. p. 11), (L. p. 12)], and hence for the contract to be reciprocal, the lender must provide the vessels when he would retake his ice.

On the various grounds already stated, it is submitted as beyond dispute that in retaking their ice, the plaintiffs were the moving party and to do the first act, viz.: to go after the ice, to provide vessels and to give the defendants reasonable notice thereof. This, by necessity, made the plaintiffs, and not the defendants, the electors of the delivery time, and they had the right to elect any reasonable date within the shipping season of 1880.

"Whenever by the contract an election is given, that election is with the moving party, the one who is to do the first act."

Co. Litt. (145 a.)
Leake on Contr. 354.
Chitty, Con. Vol. 2, p. 1061.

The language of Lord Coke is:

"In case an election be given of two severall things, alwaies he which is the first agent, and which ought to doe the first act, shall have the election. As, if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantor shall have the election, for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election *causa qua supra*. And with this agree the bookes in the margent (g). But if I give unto you one of my horses in my stable, there you shall have the election, for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple, to be taken in his wood of

D., there the grantee shall have election, for he ought to doe the first act, *scil.*, to fell and take the same.

Especially is this true if the election is *as to time* only.

"If a condition be in the disjunctive, he who ought to do the first act shall have an election to do the one or the other; and where the disjunctive goes only to the time and that is referred to the request of the obligee, it gives the election to him as to do at Mich. or before, *at the request of A.* 1 R. 446 l. 35, 37."

Com. Dig. Condition (K. I.)

Thus:

"If A. agree to reinvest a sum in three per cent. consols, in the name of B., charging the stock at a certain price, or to pay the sum in bank notes, *on B. giving A. six months' notice*, it is in the election of B. whether he will have the money reinvested, or paid in bank notes."

Chippendale v. Thurston, 4 C. & P. 98.

2 Chitty, Contracts, 1061.

Suppose the contract here read that "defendants were to return the ice next year," i. e. 1880, "*on plaintiffs providing vessels and giving them reasonable notice thereof.*" That would be precisely Chippendale's case. Would not the election be in the plaintiffs without doubt?

But we have already seen that, as applied to the evidence in the case at bar, the words above suggested "on plaintiffs providing," &c. are imported into this contract as matter of law, the same as if written in by the parties.

Hence the analogy of Chippendale's case is complete.

We submit that this principle runs through the law; that wherever there is an election of alternative acts or times *the moving party* has that election.

So in a *Commodatum*, if by the terms of the borrowing *the borrower* is to fetch the article back "next year," *he to do the moving*, as in portable articles, or where expressly so contracted, then the borrower may have the election of time within the year, because he is the actor. But where, either from the bulkiness of

the articles or from the nature and environment of the contract, *the lender* is to go after his property "next year," and fetch it back himself, then the election is with him.

B.

Again, the plaintiffs have the election *because this contract like every other must be construed with reference to the situation and intention of the parties at the time it was made, their own practical construction of it afterwards, and the peculiar nature of the ice business*, and when so construed, it is plain that both parties must always have contemplated that the election for 1880 was with the plaintiffs.

Consider:

1. *The nature of the commodity*, perishable, quick to melt, kept at great expense, rapidly fluctuating in value. Who could sell, or who would buy such property, unless the buyer could control the *time* when he could demand and have it? And who would ever lend it, unless he could take it back at such reasonable time as he would?

2. Consider *the object of the parties* in making the exchange:

On the defendants' side, it was to obtain ice in 1879, which they unexpectedly needed for customers, after they had closed their own houses, and to avoid re-opening them for these scattered cargoes. Such re-opening, it is well known in the business, would expose them to great waste and expense. (See Exhibit G, p. 10.)

On the plaintiffs' side, the object was as well stated by them in their letter to defendants, July, 1880, "Our sole object in making this exchange, no one knows better than yourselves, *was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure.*" (Exhibit "S," p. 15.) The defendants' object was accomplished in 1879. They obtained

their ice in that year, as and when they wished. The plaintiffs' object could not be accomplished, unless they had the right to retake their ice as and when they wished in 1880, and at any time when it could best be marketed. The plaintiffs, and not the defendants, must be the judge of that time, else the purpose of the contract fails and the plaintiffs would take no benefit under it.

From the nature of the business, the plaintiffs, if the election were not theirs, might lose not merely their right to make the *best* sale of this ice during 1880, but *any* sale.

It is familiar business knowledge, which the court will take notice of, that ice always is and must be sold deliverable *at the buyer's option* during the time appointed by the contract, the buyer furnishing the vessels. It appears that in this very case, the plaintiff sold this ice over in 1880, with the defendants' knowledge, and the buyers, (Hancock and Crowell,) *furnished the vessels* and called on the plaintiffs to load them, (pp. 18, 20.)

It is indispensable that the party providing vessels should have the election of delivery time during the season, else he provides his vessels for naught, and must procure them and keep them on demurrage at great expense and for an indefinite time. For the lender of ice, therefore, to meet the market at all, he must sell deliverable at buyer's option, and this he could not do unless he has himself the election of time. Without it would he ever lend?

3. Again, the contract was undoubtedly meant to be reciprocal. It was not a bailment for hire, but for mutual and equal accommodation. There was no consideration for imposing any burden on one, not imposed on the other, and no such burden was meant to be imposed without consideration. Whatever rights the defendants had and used under it in 1879, the

plaintiffs were to have the same rights in 1880. But we have already seen that the defendants claimed and exercised, without objection, absolute control of the delivery times during 1879. Unless, therefore, the court shall give the same reasonable control in 1880 to the plaintiffs, the mutuality of the contract fails.

4. Again, the plaintiffs could retake their ice when they pleased in 1880, *because the purpose of the borrowing was exhausted.*

Thus in a loan, if the purpose of the loan is exhausted, the contract is construed henceforth for the lender's benefit, and he may take his property, even though the time of bailment has not expired.

Lay v. Lawson, 23 Ala. 377.
Bailey v. Colby, 34 N. H. 29.
Pothier, Pret. a l'Usage, N. 26, 2.

Thus where a manuscript is loaned for a week to be copied, and the copy is made in two days, the lender is entitled to have the manuscript back at once.

Story on Bailments, § 257.

Here, the borrowing by defendants was not for *continuous* use, but was for 1879 alone, and by their taking and sale of it in that year, was exhausted.

As with the "*Commodatum*," so with the "*Mutuum.*" The purposes and rights of the borrower in the contract were then accomplished and exhausted. Henceforth, the contract was to be kept alive and construed to secure, and not to defeat, the purposes and rights of the lender; and to this, the lender's power to take back his ice at his own election, was indispensable.

Since the ice was to be returned from and at "*defendants' ice houses*," even if defendants, under the contract, had the right to keep the ice there till the last of the season, they could not use

it, because once gone, it could not be replaced, and they could not fill their contract with the plaintiffs.

If the defendants' houses were once emptied in 1880, after the shipping season had begun, from the nature of the business, they could not be refilled so as to answer plaintiffs' contract. Ice houses, as is well known, must be especially equipped for filling, with peculiar machinery, gear and slips. This equipment they have during the winter, but not during the summer; besides the inevitable wastage, meltage, and expense in undertaking to move ice from one house to another and load it into that house, would practically eat up the ice.

The borrower, therefore, had no further object in not delivering the ice on call.

5. The plaintiffs are entitled to have the contract construed so that they, as well as the defendants, shall have some beneficial use of the contract and of the ice.

1 Chitty Contracts, 110, 111, n. (s).

To this each party must have absolute control of the ice in his year; defendants' year is 1879, plaintiffs' 1880; defendants say: let us use up your ice this year, i. e. 1879, and you may use up same amount of ours "next year," i. e. 1880. "Next year" is used merely in antithesis to 1879 — means not *some-time* but *anytime* during shipping season. To make it mean the *end* of shipping season, or *any* time at defendants' whim, would make it valueless to plaintiffs. Ice is sold for *summer* delivery, not for fall or winter.

There is little demand and less price for ice the last day, or week, or even month, before the river closes, when the waters everywhere are becoming ice.

Plaintiffs could never get a customer if they could not tell him when, during the season, he could get his ice — still less if the

customer knew he could not get it till the very last days or day of the season, barely in time to escape from the river as it was freezing into a new crop.

And as ice is always sold f. o. b. and the customer must furnish the vessels, how shall he know when to furnish? Shall he keep them on demurrage? Unless the customer can know and control the time of providing vessels, will he buy, or could the plaintiffs hope to sell?

Ice to be returned on such conditions is unsaleable and worthless to the lender. Under a contract so construed, the lender could have no benefits and all exchanges of ice must stop.

6. Nor would such a construction advantage the borrower. Having chosen to sell his ice in 1879 and holding it in 1880 only for the lender and as his, the borrower can lose nothing by its prompt delivery on call.

The *price* at the time of delivery whether one dollar or ten dollars per ton matters not to him. Under his contract the ice returned need not and cannot be supplied from the open market, but must come from his own houses and hence be put up by him. The cost of the ice to him, therefore, is constant, and is simply the cost of putting it up, and his loss or gain is measured solely by the difference between that cost and the value of the ice when he borrowed it in 1879. If the price falls in 1880, it adds nothing to his gain. If the price rises, it adds nothing to his loss.

If he could keep the ice till the last day of 1880, we have seen that under his contract he could not use it. It belongs to the lender and it must be kept on hand, because if used, from the nature of the business it cannot be replaced. The borrower, therefore, gains nothing by *late* delivery.

On the contrary *early* delivery would be a gain.

The sooner shipped, the less the meltage, the waste by running together in the houses, the difficulty and cost of shipment. It would take more harvested tons to fill the defendants' contract in November than in July.

The defendants cannot under their contract keep the ice to sell it and to keep it and not sell it is absolute waste.

7. Finally — the whole contemporaneous interpretation of the contract by both parties before any dispute arose shows that if the plaintiffs obtained any right by their contract, they obtained the right to elect their time of delivery during 1880.

From the making of the contract in September, 1879, down to its breaking in July 1880, every word and act of both parties recognized, and implied the reciprocal right of each to elect his time of taking the ice during the season in which he was to have it.

The contract began September 6, 1879. In the very letter making the contract (Exhibit "E," p. 9) the defendants assume their right to elect the delivery time during their year, i. e. 1879. They say we "have decided to ship one more cargo and *have ordered a vessel* for that purpose." On the other hand in plaintiffs' letter of September 9, 1879, accepting the contract (Exhibit "F," p. 9) they do not dispute and therefore admit this right of election in the defendants for 1879. In defendants' next letter September 13, 1879, (Exhibit "G," p. 19) they again claim and exercise this right of election in themselves, saying:

"We find that there is going to be quite a demand for Eastern ice this fall, and we shall be obliged to use more than we calculated on. We have ordered Messrs Kilham, Loud & Co., to send one vessel a week to your place until further orders."

In plaintiffs' postal card of reply September 17, 1879 (Exhibit "I," p. 11) they again recognize and assent to this right in the defendants.

In their next letter of September 17, 1879, (Exhibit "I," p. 11) the defendants are even more distinct in claiming the right of election in themselves under the contract. They say:

"We are getting anxious about ice and hope you will see that it is shipped as soon as the vessels arrive."

In the defendants' letter of September 20, 1879, (Exhibit "J," p. 11) they complain to the plaintiffs that their vessels were not loaded *promptly* on arrival, claiming that a vessel though it arrived on the 12th, was not loaded till the 18th.

September 24, 1879 (Exhibit "H–1," p. 20) the plaintiffs explain and apologize for this delay, clearly admitting the defendants' right under their contract to have the ice delivered on call and with all promptness, and say that there is no probability of any further delay occurring.

And in the defendants' letter of September 24, 1879, (Exhibit "H," p. 10) they again say:

"We will continue to order one vessel per week from your place for the present."

In the defendants' letter of September 30, 1879, (Exhibit "H–2," p. 21) they accept the plaintiffs' excuse of September 24, (Exhibit "H–1," p. 20) for the delay in loading.

In defendants' telegram, October 9, 1879, (Exhibit "L," p. 12) they again insist on their right to have ice promptly on call, saying: "See Berry and have our vessels loaded at once."

The defendants' letter, November 19, 1879, (Exhibit "N," p. 13) markes the close of shipments for 1879, and the last ice called for by the defendants. The right in the defendants to have their cargoes on call and to elect their own time on furnishing vessels, is thoroughout assumed and exercised by the defendants and admitted and acted on by the plaintiffs.

Thus the matter stood, up to January, 1880. Up to this time, the defendants had been the ones to call for ice, and the plaintiffs

the ones to deliver; the defendants the ones to assert the right, the plaintiffs to perform the duty. And up to this time the defendants had consistently and uniformly construed the contract to be that they could call for their ice when they would, furnishing the vessels themselves, and giving reasonable notice thereof, and that the plaintiffs were then bound to deliver. The plaintiffs on their part, though against interest, had as uniformly admitted this construction of their contract and their duty under it to so deliver on call.

Henceforth, the situation *is reversed*. The plaintiffs became the ones to claim the rights, and the defendants the ones to perform the duty. The defendants, during 1879 had claimed and received their ice on call. It now became their duty to deliver it on call in like manner.

The defendants had deliberately chosen their construction of the contract when that construction was in their own favor. The plaintiffs had concurred and acted upon that construction, and had delivered three thousand two hundred and forty-five tons of ice on the strength of it. We submit, as matter of law, that the defendants will not be permitted but are estopped after this to deny that construction as soon as it became favorable to the plaintiffs, and to set up the opposite construction.

The time now came for the plaintiffs to sell their ice as best they could for 1880 shipment.

Accordingly in January, 1880, the plaintiffs notified one of the defendants that they had an offer for the ice and what the offer was, and gave the defendants the privilege of the purchase, which they declined, saying they could put it up cheaper. (The report of the case, by misprint, reads "*purchase* it cheaper," but the context shows that it should be "*put it up* cheaper.") Finally the plaintiffs—still acting and having a right to act on the construction thus uniformly put upon the contract by both parties,

and especially by the defendants — sold their ice in defendants' houses, with defendants' full consent and advice.

James B. Dingley, p. 18.

"In January, I told Oler we had an offer for the ice. I said 'I suppose you do not want to purchase that ice.' He said — No, he could put it up cheaper. I told him what we could get for it — what we had been offered for it. He said he could put it up at less than seventy-five cents per ton. Ice of 1879 was much better than that of 1880. We contracted for the sale of the ice. He (Oler) knew of it; he advised our making the sale. Oler said, in July, he thought they might have from three thousand to five thousand tons surplus."

Fuller Dingley, p. 20.

"In January, 1880, my brother told Oler we had an offer for our ice in his houses, and asked him if he would like to buy. He said he did not. Asked his advice about selling, and he advised us to sell."

The precise terms of the contract are not shown, but enough appears to show:

1. That the buyers were to furnish vessels, and,

2. That it was deliverable on call, or at buyer's election as to time of delivery.

"We were called on to deliver the ice under our contract of sale. We had vessels tendered us to load, and we called on Marson & Co.'s agent for the ice. Vessels were not accepted. We have never received any ice from defendants in return for that we let them have."

(James B. Dingley, p. 18.)

Furthermore, the defendants, as ice dealers, well knew that these were the usual terms of sale, and that, from the nature and usages of the business, *any* sale must oblige the vendee to furnish vessels and give him, of necessity, the right to furnish them and call when he would. The defendants knew that

plaintiffs were treating that ice as absolutely theirs, as deliverable and transferable on call; they knew that the plaintiffs could not sell at all, except by virtue of this control and election of the time of delivery. They permitted and encouraged the sale. June 7, 1880, they wrote the plaintiffs (Exhibit 2, p. 17) "I think, from the way our houses are turning out, we shall have about five thousand tons to spare."

And they repeated the same in conversation with the plaintiffs in July, 1880.

"Oler said in July he thought they might have from three thousand to five thousand tons surplus."

James B. Dingley, p. 13.

In June or July, 1880, they were again reminded by the plaintiffs that the ice had been sold, and sold on call; that the vendees might call on Dingley and he on the defendants any day for it; and that their refusal to deliver ice worth five dollars a ton meant ruin to the plaintiffs. "I had conversation with William Oler, in June or July, at Gardiner. He said, 'What about that ice we had of yours?' I said I was expecting parties we had sold it to *would call for it any day; expected they would call in May.* Oler *said he did not know about that,— delivering their ice to us*, taking it at a time when ice was worth fifty cents per ton and *delivering it back* when it was five dollars per ton; he did not think that was right. I said: 'If you refuse to deliver that ice you will ruin me. I have sold it; and ice is so high now it would ruin me if you refuse to deliver it.' Oler said he was not aware we had disposed of the ice. I said his father was fully aware of it when he was there. He said he would not say anything further until he went home, and then he would communicate with us."

In this most important conversation, Oler said no word questioning the *right* of the plaintiffs to elect their time but complained solely that ice had risen since they borrowed.

Even in breaking their contract by the two letters of July 7th and July 15th, (Exhibits "R" and "T," pp. 14,15 and 16) the defendants did not question the plaintiffs' right to elect the delivery time, and claimed no right of election in themselves but claimed to repudiate the whole contract on other grounds. Striving, as the defendants then were, to evade their contract, and under the sharp stimulus of interest, would they not have discovered this defense themselves if it existed and plainly said "you can not oblige us to deliver now. We have the whole season to perform, and the delivery time has not come till we elect," if such a construction had been possible, or within the contemplation of the parties?

Will the court adopt a construction which the parties never contemplated, and which would defeat and not uphold the contract.

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Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 149.

JAMES B. DINGLEY, ET AL.

vs.

WESLEY M. OLER, ET AL.

—o—

No. 150.

WESLEY M. OLER, ET AL.

vs.

JAMES B. DINGLEY ET AL.

—o—

CROSS APPEALS.

—o—

Writs of Error to the Circuit Court of the United States for the District of Maine.

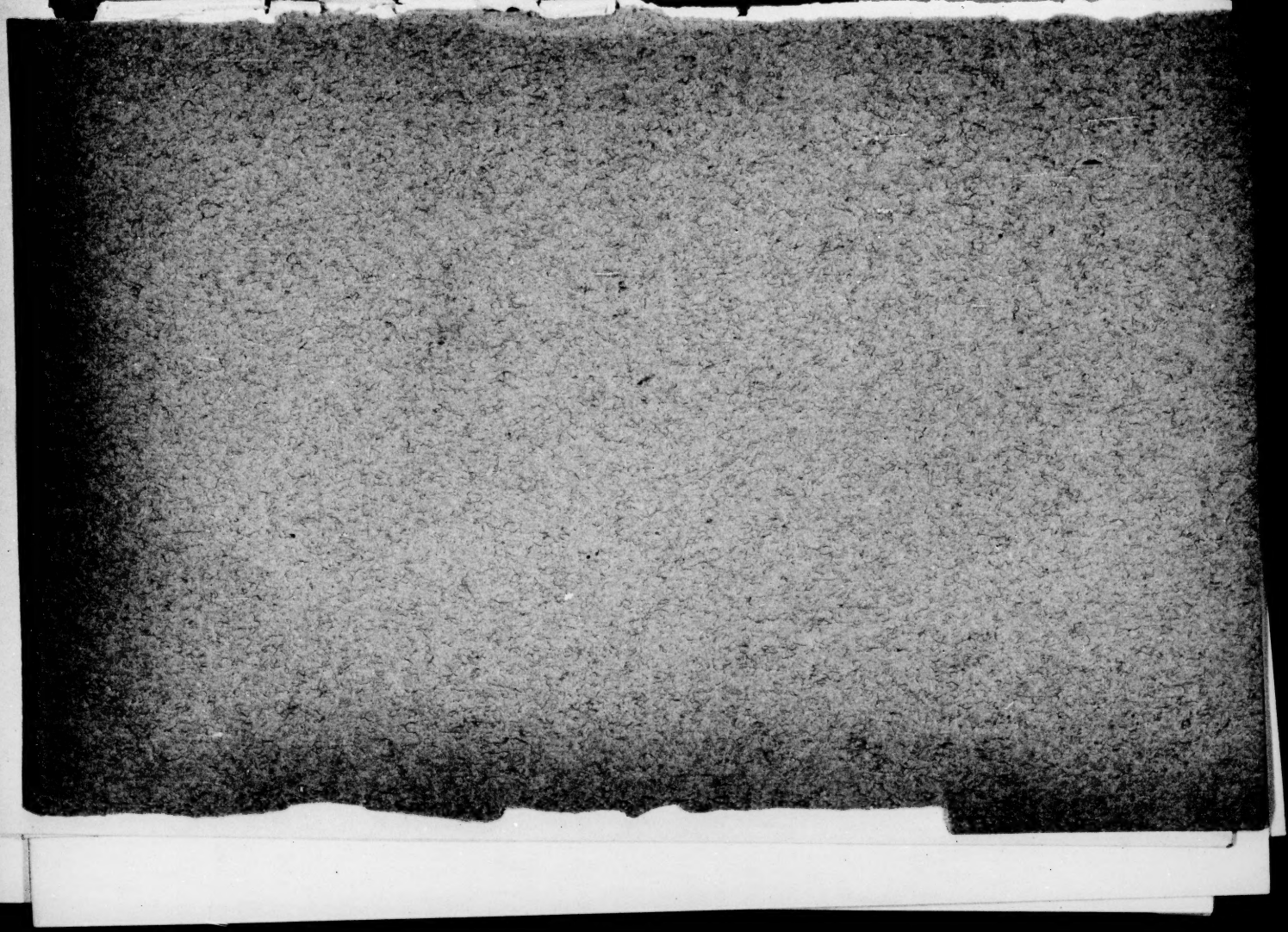
—o—

BRIEF FOR WESLEY M. OLER, ET AL

Defendants in the Court below.

—o—

BERNARD CARTER,
Counsel for Oler & Co.



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CROSS APPEALS.

Writs of Error to the Circuit Court of the United States for the District of Maine.

BRIEF FOR WESLEY M. OLER, ET AL.

Defendants in the Court below.

STATEMENT OF THE CASE.

1st. Upon the 21st day of July, 1880, James B. Dingley and Fuller Dingley, citizens of the State of Maine, composing the firm of Dingley Brothers, brought, in the Superior Court of Kennebec County, in the State of Maine, an action of assumpsit for an alleged breach of a contract entered into with them by Wesley M. Oler and William H. Oler,

citizens of the State of *Maryland*, composing the firm of W. M. Oler & Co. (Printed Record, 4, 5.)

The case was thereupon, in due time and form, removed by the defendants, Oler & Co., into the Circuit Court of the United States for the District of Maine, (printed Record, 5,) where (a jury having been waived, printed Record, 6,) it was tried before Court (Judges Lowell and Fox) during the September Term, 1881, (printed Record, 6;) but, having been kept under consideration by the Court, final judgment was rendered on the 22d of September, 1882, in favor of the plaintiffs for $7,335.35. (Printed Record, 21.)

The opinion of the Court, as delivered by Judge Lowell, will be found on pages 28 to 30 of printed Record.

2d. From the judgment thus rendered the plaintiffs (printed Record, 1,) and also the defendants, (printed Record, 8,) sued out a writ of error.

The questions brought up for review here arise upon exceptions taken by the respective parties to rulings made by the Court, after the testimony was closed, upon matters of law in response to requests from counsel for the respective parties. (See plaintiffs' bill of exception, printed Record, 22 to 24; and defendants' bills of exceptions, printed Record, 24, 28.) The points thus ruled will be stated particularily hereafter.

3d. The plaintiffs, Dingley Brothers, residents of Gardiner, Maine, were, in 1879, and in years prior and subsequent thereto, engaged in the ice business on the Kennebec

river, cutting or purchasing it, and shipping it to various points,

The defendants, Oler & Co., were ice dealers in the city of Baltimore, Maryland, getting their supply from ice houses of their own on the Kennebec river, as well as elsewhere.

4. The contract, for the alleged breach of which the action in this case was brought, is to be ascertained from certain letters which passed between the plaintiffs and defendants in the year 1879.

5. There was a special finding of the facts by the Court below, which is contained in the respective bills of exceptions of plaintiffs and defendants. (Printed Record, 22, 24.) This special finding contains extracts from the letters, by which the contract was made, and also of the letters which are supposed to contain the alleged breach of the contract; but the letters *themselves* are "made part of this statement." (Printed Record, 25.)

We re-produce here the special finding, giving the letters above referred to, however, more in full. We quote from p. 24 of Record, from defendants' bill of exceptions, (*italics*, where occurring, being ours): "The Court found the facts to be that late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which *threatened* to be a *total loss*, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec river, and shipping it thence during the *season*, that is, while the river is open. The offers of the plaintiffs were rejected, but the defendants, by their letter of September 6, 1879, made a counter-offer 'to take a cargo and return the same to you

next year from our houses.' The plaintiffs, by their letter of September 9, 1879, accepted this offer, and several cargoes were delivered upon the same terms. The total delivery was 3,245.25 tons."

We now give fuller extracts from the letters above referred to, giving all such portions as seem to bear upon the contract.

6. The correspondence was opened by Dingley Brothers by their letter of August 15, 1879. (Printed Record, 6.)

"GARDINER, *August 15, 1879.*

Wesley M. Oler & Co., Baltimore.

DEAR SIR:

Through the knavery and unmeasured villany of the Barkers, we find ourselves saddled with six thousands tons of ice in this wise: last winter, under their fair promises, we were induced to purchase of Mr. Berry said quantity of ice, advancing on the same $2,000. * * * Now here we are with this upon our hands, and probably no sale for it this *season;* and, by the terms of the contract with Mr. Berry, the ice is *forfeited* to him upon the closing of the river, if not shipped.

Now it occurred to us that we might make some exchange with you in some manner that might *save us*, or partially so, and not greatly to your disadvantage. We have been waiting to see what turn matters took in Washington, but have now concluded to abandon the idea of placing any of it there this season. Do you not think you might relieve us in some way *without damage to your own* interest.

(Signed,)

DINGLEY BROTHERS."

To this letter, Oler & Co. replied on the 19th of August, saying: "We feel sorry that you should be placed in your present position, in regard to the 6,000 tons of ice, and were it in our power, would be glad of the opportunity to do you a *favor* in relieving you of it," but explaining that they had already, by a mistake of their agent, been obliged to ship more ice from the Kennebec than they needed.

In answer to this letter, Dingley Brothers again wrote on August 27, 1879, saying: "We were earnestly hoping that you might be wanting to ship more ice from the Kennebec. We were thinking that you usually shipped a few thousand tons, late, for oysters, &c., and were thinking you might make an exchange with us in some way. In that case, of course, we could not expect you to *buy* at any reasonable rate, if at all, but thought perhaps you might ship from Berry's, and leave over some in your buildings, and will ask you to do something of this kind if you make further shipments," &c. (Printed Record, 7.)

To this letter Oler & Co., on September 3, 1879, replied, saying: "At present writing we do not expect to ship any more ice, but if we should need one more cargo, we will bear you in mind." (Printed Record, 8.)

Dingley, writing on the same day, (Record, 8,) (wrongly printed in Record as April 3d,) again express an earnest hope that Oler & Co. will be able to take a portion at least of their ice, and saying, "of course we expect you to make such terms and arrangements as will not result to your disadvantage."

Dingley & Bro. also in this letter ask Oler & Co. to see if they could not sell the ice to Cochran & Co., another ice firm doing business in Baltimore.

In answer to this letter, Oler & Co. wrote their letter of *September 6*, 1879, referred to in the statement of facts found by the Court.

In this letter, after telling Dingley Bros. of their efforts to sell the ice to Cochran & Co., they say:

"We have decided to ship one more cargo, and have ordered a vessel for that purpose. It would of course be more convenient for us to ship this cargo from our own houses, but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo at your house, should our terms be agreeable to you. We of course do not entertain the idea of buying, having a *superabundance* on hand; but will take this cargo, and return same to you *next year* from our houses.

"We wish heavy and perfectly square ice, as this is the only kind we can use, for we want it for our oyster trade, which demands this kind. If this is satisfactory, you may show this letter to Marson," [who was Oler & Co.'s agent in Maine,] "as an order from us."

To this letter, Dingley Bros. replied on September 9, 1879, as follows:

"Yours of the 6th is received, and we are very glad of the opportunity of starting a little of our ice, and *you shall have the best there is*, and we *think you will not regret your effort to accommodate us.*

"From what you write, we think you have in mind to load the ice yourselves; our contract with Mr. Berry is for him to pack on board, suitably dunnaged, &c. To this we do not suppose you will object, as it saves you so much funds until another season. And this we are willing to do, and *more*, if ice should be worth more than 75 cents per ton another season. We shall give you some advantages on

what you may have of ours in your buildings, and can most likely furnish you with some room in the old buildings, (Barker's) if you need it. This would protect you from loss in that direction in case of a good winter, *and, in fact,* WE DO NOT PROPOSE TO YOU TO BECOME LOSERS ON ACCOUNT OF EXTENDING US THIS ACCOMMODATION." (Printed Record, 9, 10.)

To this letter Oler & Co. replied, and after saying they found that, in consequence of the demand for ice, they could take more than one cargo, they say: "*We note your remarks* in regard to this exchange, and assure you that we felt satisfied that it would come out all right in the end;" and "we have written to Marson and given him necessary instructions in regard to overseeing the loading. The arrangement is perfectly pleasant to us."

There is nothing material to note in the further correspondence in 1879, except that Dingley Bros. offered the remainder of the Berry ice to Cochran & Co., of Baltimore, at sixty cents a ton, but were not able to sell it to them, the highest price suggested by the latter being forty cents. Dingley Bros. were willing to accept an offer from them of fifty cents. (See letter of September 24, 1879, printed Record, page 20—bottom.)

7. Matters remained thus till July, 1880, except that, according to the testimony of the Dingleys, some conversation took place between Mr. W. H. Oler and the Dingleys, in January, 1880, in which house-room for the ice which Oler & Co. owed to Dingleys was referred to, and in which conversation Mr. Oler advised the Dingleys to sell the said ice, declining to buy it himself. (Printed Record, 17, 18, 19, 20.)

This conversation is not, in the judgement of the counsel for Oler & Co., in any way pertinent to the questions now to be decided.

8. In June or July, 1880, the subject matter of this ice was referred to in a conversation between Wesley Oler and one of the Dingleys. (Record, 14.)

We quote the conversation as given by Mr. Dingley: (Record, page 14.)

"I had a conversation with William Oler in June or July, 1880, at Gardner. He said 'what about that ice we had of yours.' I said I was expecting parties we had sold it to would call for it any day; expected they would call in May. Oler said he did not know about that—delivering their ice to us, taking it a time when ice was worth fifty cents a ton and delivering it back when it was five dollars a ton; he did not think it was right. I said, 'if you refuse to deliver that ice you will ruin me. I have sold it, and ice is so high now, it would ruin me if you refused to deliver it.' Oler said he was not aware he had disposed of the ice. I said his father was fully aware of it when he was there. He said he could not say anything further until he went home and then he would communicate with us. I received a letter afterwards from the defendants."

9. In pursuance of this promise, Mr. Wesley wrote on July 7, 1880, to the Dingleys, who replied on July 10, 1880, and were replied to by Oler & Co. on July 15, 1880. (Printed Record, 14 to 16.)

In their letter of July 7, 1880, Oler & Co., after referring to the correspondence of the previous year, and quoting from the letter of the Dingleys of September 9, 1879, the words, "*in fact we do not propose for you to become losers on account of extending us this accommodation*," and saying that Mr. W. H. Oler

had no knowledge that Dingleys intended to sell the ice, and expressing regret that old friends should differ, say, "but we feel that it is not just or equitable for you (in consideration of the ice being used only by us upon your earnest solicitation and upon your representation that you would *lose the whole*, unless we assisted you by taking some) to expect us to give you ice *now* worth five dollars per ton when we have your letters offering the ice that we got at *fifty cents* a ton. We must, therefore, decline to ship the ice for you this season, and claim, as our right to pay you for the ice, in cash, at the price you offered it to other parties here, *or give you ice when the market reaches that point.*"

10. In their reply of July 10, 1880, the Dingleys after saying that their sole object in making this exchange was to tide them over to such a time during this season, as the ice could be marketed at some reasonable figure, and saying that, acting upon this view they had sold the ice, they tell Oler & Co. that for the latter to ask a postponement in the delivery seems to the Dingleys *hardly right.*

They then say, "now whatever the final settlement of this matter is to be, we want you to fill our order; otherwise we cannot tell what the result will be." Then after saying neither they nor Oler & Co. could afford to do wrong in the matter, and expressing their regrets that any difference of opinion should have arisen, they conclude their letter thus: "hoping you will take a more favorable view *upon further reflection*, we remain, truly yours, &c." (Printed Record, 15.)

11. To this letter, Oler & Co. replied on July 15, 1880. (Printed Record, 15.)

After expressing their regret that they could not see the case in the light the Dingleys saw it, they re-state the case

as they understand it, and say: "The case briefly stated appears to us this, (as we think the correspondence of last year will show): Being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances we at length agreed, purely for your accomodation and relief, to take one cargo, and later, under the same influences, to take more. Now you ask us, *at a time when* we are pressed by our sales and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends, but regard it our duty to protect our own interests, always with a proper regard to the dictates of right. We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein, and in ours of the 7th.

You do not reply to our arguments, but simply ask us to surrender our well-formed opinion.

Can you reasonably ask us to do this!

Is not your usually clear and equitable judgment clouded by the manifest considerations of self-interest pressing upon you?

We beg you to consider, *anew*, all the circumstances of the transaction and your assurances to us as inducements to

make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to *hear from you in reply*, but would be *more pleased* to have a *personal interview*, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever before. We are deprived of the services of W. Geo, and therefore cannot come to see you."

12. *Within three or four days after the receipt of this letter*, and without answering it, or *in any way* responding to its invitation to communicate with Oler & Co., Dingley Brothers, on the 21st day of July, 1880, began this action. (Printed Record, 5.)

13. It was admitted (printed Record, 14) that the value of ice on the Kennebec river throughout July, 1880, was five dollars per ton.

It was proved (printed Record, 19) that ice fell to two dollars per ton before the season of 1880 closed.

Rulings of the Court.

A. These are stated in the bill of exceptions of plaintiff and defendants, the two statements being substantially the same. (Printed Record, 23, 25.)

We take the statement as contained in plaintiffs' bill of exceptions, (Record, 23.) Upon these facts the Court held, as matter of law, (we break into paragraphs the passage in the Record containing the rulings):

1st. That there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to

deliver 3,245.25 tons of ice from their houses on the Kennebec river during the year 1880.

2d. That the year means the shipping season; and the defendants had the whole season, if *they chose to demand it*, in which to make delivery.

3d. That the letters of July 7th and 15th, 1880, contained an unequivocal refusal to deliver any ice during that season; that the defendants having unqualifiedly refused, this action can be maintained, though brought before the close of the season.

4th. That the damages are not to be reckoned by the price of ice in July; that what the plaintiffs lost was 3,245 tons of ice *some time during the season;* that the price of ice having gone down after July, and during that season, to two dollars a ton, the measure of damages must be reckoned at this rate, with interest from the date of the writ.

B. To the law, as thus laid down by the Court, the plaintiffs, as well as the defendants, excepted, and their respective exceptions were allowed. (For plaintiffs' exceptions, see printed Record, page 23; and for defendant's exception, see printed Record, 25.)

Assignment of Errors.

1. The plaintiff assigned as error in the foregoing rulings of the Court, the following. (Printed Record, 23):

1st. The ruling, that the defendants had the whole of the shipping season of 1880, if they choose to demand it, in which to deliver the ice.

2d. The ruling, that the measure of damages was not the price of ice in July, 1880, when a demand was made and a refusal given.

3d. The ruling, that the price of ice when it had gone down to two dollars a ton, was the measure of damages.

The defendant assigned as error in the same rulings of the Court, the following. (Record, 25):

1. The ruling, that a cause of action had accrued to the plaintiffs when the suit was brought.

2. The ruling, that this action can be maintained.

3. The ruling, that under a legal construction of the contract, the plaintiffs were entitled to recover, *in any event*, more than seventy-five cents per ton.

Argument.

In discussing this case, we shall:

1st. Announce and endeavor to maintain the several propositions which we think maintainable in the case—and then,

2d. Applying the positions thus sought to be maintained, to the errors assigned on the part of the plaintiffs and defendants, we will state which of the rulings of the Court should, in our opinion, be affirmed and which reversed.

A.

The propositions for which we contend, are as follows:

1st. That by the true construction of the contract entered into between the Dingleys and Oler & Co. in the year 1879, the latter were only bound to return the 3,245 tons of ice in the season of 1880, provided they could do so without loss to them; that therefore they had a right to refuse to do more than pay the price which ice was worth at that time in 1879, at which Oler & Co. took the ice of Dingley Bros. as an accommodation to them, if the latter were not willing to wait for the delivery of the ice till it fell to such price.

2d. That if the foregoing proposition cannot be maintained, yet, by thetrue construction of the contract as entered into in 1879, Oler & Co. had all of the season of 1880 in which to deliver the ice, and could not be required by the Dingleys to deliver it in July, 1880.

3d. That even if Oler & Co. were bound to deliver the ice during the season of 1880, yet having, as shown under our 2d proposition until the end of the season to deliver, no action could be brought in July, 1880, for the non-delivery, even although the Court should construe the letters of Oler & Co., of July 7th and July 15th, 1880, as an unequivocal refusal to deliver any ice during the season.

4th. That even if the third proposition above stated cannot be maintained, and the Court should hold that an unequivocal refusal in July, 1880, to deliver any ice during the season, would authorize the Dingleys to bring an action immediately, without waiting till the end of the season; yet in this case there was no such unequivocal refusal; and that

the letters written by Oler & Co. on July 7 and July 15, did not contain any such refusal, but on the contrary invited further conference on this subject, which, instead of granting, the action in this case was brought without any notice to Oler & Co., or demand upon them for the delivery of the ice; and therefore it cannot be maintained,

5th. If the Court should hold that neither the first, third nor fourth propositions can be maintained, and that the action can be maintained, then the measure of damages was rightly determined by the Circuit Court.

We will discuss these propositions in the above order.

B.

First Proposition. That by the true construction of the contract, Oler & Co. were only bound to return the ice, provided they could do so without loss to them, and that therefore, they had a right to refuse to do more than pay the price the ice was worth in 1879, when Oler & Co. took it as an accommodation, if the Dingleys were not willing to wait for the delivery till it fell to such price.

The terms of the contract are to be found in the written correspondence which took place in September, 1879. The letters referred to are those from Dingley Bros., of August 15, August 27, September 3 and September 9; and from Oler & Co., of August 19, September 3, September 6 and September 13. (Printed Record, 6 to 10.)

Their letters have been fully set out in a previous part of this brief, (pages 4 to 7,) and show that in 1879, Dingley

Bros. purchased of Berry 6,000 tons of ice, and advanced him $2,000 on the purchase, one of the terms of which, was, that if the ice was not shipped from the river during the season of 1879, the same was forfeited to Berry.

Having this ice on their hands, with no probability of being able to sell it, and so save the forfeiture, they asked Oler & Co. if some arrangement could not be made between them, which would relieve Dingley Bros. from their dilemma, without damage to Oler & Co. (Letter of Dingley, August 15, Record 6.)

The mode suggested by Dingleys was (letter of August 27, Record, 7) that Oler & Co. should ship the Berry ice to Baltimore, instead of shipping from their own houses, which themselves contained *more* than Oler & Co. needed for that season; the Dingleys stating that they could not expect Oler & Co. "to buy at any reasonable rate, if at all."

When the request was first made to Oler & Co., they expressed regret that they could not do the favor asked, as they then intended to ship no more ice that season from the Kennebec. (Letter of August 19, Record 7) But subsequently finding they would need one more cargo, wrote their letter of September 6, 1879, to which Dingley Bros. replied in their letter of September 9, to which Oler & Co. replied on September 13. (Printed Record, 9, 10.)

We contend that these two letters taken together show—

(*a*) An expression of willingness by Oler & Co. to comply with the request theretofore made of them by Dingley Bros. to make an exchange of ice with them; and a proposition by Oler & Co. if these terms were satisfactory to Dingley Bros.

to ship in 1879 a portion of the Berry ice instead of from their own houses, and to return the same quantity from their houses to Dingley Bros. in 1880.

(*b*) An agreement by Dingley Bros., that if Oler & Co. would do as they proposed, the doing of it should not result in loss to Oler & Co.

In support of the interpretations thus put on these letters, we submit—

1st. That the arrangemement was entered into solely for the accommodation of Dingley Bros., and was in no way for the advantage of Oler & Co.

2d. That the letters of Dingley Bros. preceding Oler & Co's letter of September 6, all show that the understanding of Dingley Bros. was that if Oler & Co. were able to comply with their request to come to their relief, it was not to result in damage to Oler & Co. (Printed Record, 6 to 9.)

3d. The letter of Dingley Bros. of September 9, 1879, 1st suggests that as Berry was bound to load the ice they should be allowed to do so, and thus Oler & Co. would be saved the expenditure of money in loading, till the season of 1880; and, 2d, suggests what they would do if ice was worth more than seventy-five cents in 1880. Then, as if these suggestions did not meet the case, they add: "In fact, we do not propose for you to become *losers on account of extending this accommodation to us*"

4th. To this letter, Oler & Co. reply on the 13th, and say, *inter alia*, (Record 10,) "We note your remarks in regard to this exchange, and assure you we feel satisfied it would come out all right in the end;" and, again, "the *arrangement* is perfectly satisfactory to us."

5th. Can it be doubted that the plain import of all this correspondence is that though the ice was to be returned in 1880, if the price was the same as it was in 1879, and so it could be returned *without loss to* Oler & Co., yet, if the price was such in 1880 as that a cargo of ice was then worth more than it was in 1879, there was no obligation to return it in specie, but only to give to Dingley Bros. an equivalent of that which Oler & Co. had taken in 1879 to oblige Dingley Bros.?

6th. How otherwise is it possible that the return should be made without loss to Oler & Co.?

7th. If Oler & Co. were obliged to return the ice at *all* events in 1880, *no matter what it was worth*, then assuming that ice was worth during 1880, (what it was actually worth when deliverey was demanded by Dingley Bros. in July, 1880,) $5 a ton, then Oler & Co. were obliged (there being 3,245 tons) to give Dingley Bros., in 1880, $16,225, for what was only worth, when they got it in 1879, $1,622, (measuring its value at fifty cents a ton, this being the price at which Dingley Bros. were willing to sell to Cochran & Co., of Baltimore, in September, 1879. See printed Record 20, bottom;) that is, though Oler & Co. were assured they were not to become losers on account of their friendly act, they were to give in 1880 an article worth *ten times* as much as that was worth which they got in 1879.

C.

If we are right in this, our first proposition, then we submit that it follows that the Court erred in holding (printed Record, 25,) that the defendants were bound, at all events, to deliver 3,245 tons of ice during the year 1880, and in

overruling the first request of the defendants to rule "that this action cannot be maintained upon the evidence given," (printed Record, 24,) because—

1. If the defendants were not bound to deliver in 1880, if such delivery could only be made at a loss to the defendants (as we have endeavored to show), then it was error to say that there was an absolute obligation to deliver in 1880.

2. If the defendants were not bound to deliver in 1880, if such delivery could only be made at a loss to the defendants, then it was error to rule that the action could be maintained on the evidence offered; because the evidence showing that ice was worth five dollars at one time, and two dollars at another, in 1880, was conclusive evidence that the delivery could only be made at a loss, in the *absence* of all countervailing testimony, that notwithstanding this excess in price over the price in 1879, the ice could have been delivered in 1880 without loss to the defendants.

For illustration—there is no evidence to show that the high price of ice was owing in any way to a small supply on the Kennebec river; there is, therefore, nothing from which it can be legally inferred that Oler & Co. could not have filled all their houses, even if the 3,245 tons had been taken out of them in 1879, instead of out of Dingley Bros.' houses.

Therefore there is nothing to show that if they were required to take 3,245 tons out of their houses to give to Dingleys in 1880, when ice was worth from five to two dollars, they would not lose just the difference between what that quantity of ice was worth in 1880, and what it was worth in 1879. Now, if there had been evidence that Oler & Co. were only able to cut enough ice in 1880, to fill up the space left in their houses over and above that occupied

by the 3,245 remaining in them from the season of 1879, then it might with some show of reason be claimed that the obligation to deliver the 3,245 tons in 1880, did not result in loss to them, notwithstanding the difference in price; inasmuch as in such hypothetical case, if they had taken the 3,245 tons from their own houses, in 1879, they would have had just this much less to sell in 1880.

Therefore, if we are right in our interpretation of the real contract entered into between the parties, there was no other evidence to countervail the affirmative evidence that a delivery in 1880 would entail loss on the defendants, furnished by the evidence of the difference in price.

It is, therefore, respectfully submitted that the rulings of the Court above mentioned, were clear error.

3. *Again.* The declaration in this case counted on an absolute agreement to deliver the 3,245 tons in 1880.

Now if we are right in our interpretation of the contract entered into in 1879, then the evidence established an *entirely different* contract from that set out in the declaration, and the defendants were right in asking the Court to rule that *this* action could not be maintained upon the evidence given (printed Record, 24); the exception expressly stating that the pleadings are made part of the exceptions, and the Court erred in overruling this exception, and ruling that there was an absolute contract to deliver in 1880, irrespective of consequences to defendants. (Printed Record, 25.)

There was an utter want of correspondence between the *allegata* and *probata*.

But conceding (*ex gratia argumenti*) that our first proposition is not maintainable, we submit—

Proposition No. 2. (See page 14 of this brief.) That Oler & Co. had all of the season of 1880 to deliver the ice, and could not be required to deliver it, or any part of it, in July, 1880.

1. In the letter of Oler & Co., of September 6, 1879, (printed Record, 9) they say: "We will take this cargo, and return the same to you *next year*." The word year, the judge of the Circuit Court correctly says, as used by the parties in this matter, means the "shipping season." The "next year," in the letter of Oler & Co., meant, therefore, the shipping season of 1880.

2. We understand it to be settled law, that where there is an undertaking to do a thing in a certain *year*, or month, or any other determinate time, the party so undertaking has the whole year, month, &c., to perform his undertaking, and is in no default until the expiration of the period.

2 Wharton on Con., 884.
Benjamin on Sales, 684, 685, (1 Vol. Ed.)
2 Parsons on Con.

Proposition, No. 3. (See page 14 of this brief.) That having all of the season of 1880 to deliver the ice, this action was prematurely brought in July, 1880, (which was long prior to the close of the season,) even though the Court should find that the defendants, by their letters of July 7 and July 15, 1880, (printed Record, 14, 15,) declared that they would not deliver the ice during the season.

The principle on which this proposition rests is thus stated in Parsons on Contracts, (Vol. 2d, bottom page 809:)

"If one bound to perform a future act, *before* the time for doing it, declares his intention not to do it, this is no breach of his contract; but if his declaration be not withdrawn when the *time comes* for the act to be done, it constitutes a sufficient excuse for the default of the other party."

The principle here stated was, until quite recently, the recognized law in England.

Mees. & W. 475, Phillpotts vs. Evans.
4 Exchequer, 345, Ripley vs McLure, (Parke, B.)
8 Add. & Ell. (N. S.) 378, (Lord Denman.)
Law Rep. 5 Exch. 326, Frost vs. Knight, (Kelly, C. B.)

It is not denied that the English Courts have more recently departed from this doctrine, and held that an absolute and unequivocal declaration by a party to a contract that he will not perform it, though made before the time fixed for his performance, will justify the other party in treating the repudiation of the first party as a wrongful putting an end to the contract, and in bringing his action as on a breach of it.

Hochster vs. DeLaTour, 75 Eng. Com. Law, 678, (2 Ell. & B. 679.)
Frost vs. Knight, Law Rep., 7 Exch. 111.
Avery vs. Bouden, 5 Ell. & Bl. 714.

Nor must we omit to say that this Court, in Smoot's case, 15 Wall. 48, in mentioning the case of Hochster vs. DeLa-Tour incidentally, does not signify any disapproval of it.

But the doctrine of the older English cases is maintained by the Supreme Court of Massachusetts, in a very ably reasoned opinion, in which all the cases are reviewed, and it is respectfully submitted, the doctrine there maintained is the correct one.

Daniels vs. Newton, 114 Mass. 539.

See also—45 Conn. 496, Day vs. Ins. Co.

In New York, the Court of Appeals, though referring to the case of Hochster vs. DeLaTour, have not adopted it, though it has not overruled it.

See 61 N. Y. 496.

But upon the supposition that the Supreme Court of the United States adopts the doctrine of *Hochster vs. DeLa Tour*, Frost vs. Knight, and the other cases which have followed them, then we submit our—

Proposition No. 4. (See page 14 of this brief.)

There was no such absolute and unequivocal refusal of Oler & Co. to deliver the ice during the season of 1880, as authorized the plaintiffs to bring this action before the end of the season, the defendants having, as we here assume, till the end of the season to make the delivery.

(*a.*) All the cases which assert the right of a plaintiff to bring the action *before* the time fixed for performance, declare that the repudiation of the contract by the defendant must have been unequivocal, fixed and absolute.

Thus in Hochster vs. DeLaTour, 2 Ell. & B. 679, the case in which, as we have seen, the doctrine had its origin, and which came up on a rule *nisi* to enter a non-suit, or arrest the judgment, Lord Campbell says—(page 689:)

"The declaration in the present case, in alleging a breach, states a *great deal more* than a passing intention on the part of defendant, which he may repent of, and could only be proved by evidence that he had *utterly renounced* the contract, or done some act which rendered it impossible for him to perform it."

And again—(page 690:)

"It seems strange that the defendant, after *renouncing* the contract, and *absolutely* declaring that he will *never act under it*, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind."

And in Frost vs. Knight, Law Rep., 7 Exch. 118, Byles, J., says: "An *absolute, unconditional renunciation* of a contract, before the time of performance, amounts to a breach, though only at the election of the promisee."

And this Court itself, in Smoot's case, 15 Wall. 48, above referred to, quoting with approval Benjamin on Sales, says:

"A mere assertion that the party will be unable, or will *refuse* to perform his contract, is NOT sufficient; it must be a *distinct* and *unequivocal, absolute* refusal to perform the promise, and must be acted upon as such by the party to whom

the promise is made, for if he afterwards continues to urge or demand a compliance with the contract, it is plain he does not understand it to be at an end."

The Court also here, citing the case of *Avery vs. Bowden*, 5 Ell. & Bl. 714, in which there was a contract by defendant to furnish a cargo at Odessa for plaintiff's ship, said:

"After the arrival of the ship, and *within* the 40 lay days, the officers of the ship, at four different times, applied to the agent of defendant for cargo, who said, 'we have *none* for you,' and at last said, 'I have *no cargo* for you; you had better *go away*. Upon this testimony the judges, both in the Court of Exchequer, and of Exchequer Chamber, were unanimous in the opinion that this conduct of the agent did *not* relieve the plaintiff from the obligation to remain the 40 days, and that on that account, he *could not recover*."

See also the opinions of Coleridge and Keating, J. J., in Freeth vs. Burr, Law Rep., 9 Com. Pl. 214.

(*b.*) In the light of these decisions, we submit there was no distinct, unequivocal, absolute, refusal on the part of Oler & Co. to deliver the ice in the season of 1880.

(*c.*) Unless the letters of Oler & Co. of July 7, (printed Record, 14,) and July 15, 1880, (printed Record, 15,) contain such refusal, there was no such refusal.

The letter of July 7, 1880, was preceded by a conversation about the ice, which took place a short time before the letter, between one of plaintiffs and one of defendants, in Gardiner. (Record, 14.)

This was the first time, during the season of 1880, that the subject was referred to; it was a friendly discussion as

to whether, under the terms of their agreement, the plaintiffs could expect the ice to be delivered when it was worth $5 a ton, as against *fifty cents* a ton, when it was received the year before; the result of the conversation was, that Oler agreed to write to plaintiffs on his return to Baltimore. The letter of July 7, 1880, was the fulfilment of this promise.

In this letter, Oler & Co., after saying that they felt it was not just or equitable in plaintiffs to expect them to give ice, *then* worth $5, in substitution of ice worth 50 cents, when they had received it, say "we must decline to ship the ice for you this season, and *claim* as our right to pay you for the ice in cash—at the price you offered it to other parties here, *or* give you ice when the market reaches *that point.*"

We submit as to this letter—

1st. That taken in connection with the oral conversation out of which it arose, it is but a statement of their understanding of the contract.

Only one of the Olers had taken part in the oral conversation, and it was necessary for him to consult with his father, the other member of the firm, before announcing with authority their *understanding of the contract.*

Fairly considered, therefore, the letter cannot be considered as "a distinct, unequivocal, absolute refusal to perform the contract," to use the language of this Court in 15 Wall., 48. It is, *at most*, but a mere assertion that they will refuse to perform the contract, which, according to the case in 15 Wallace, is *not* enough.

It is but a declaration of their view of the case, at that time, that is, in the opening of the discussion, but subject

to review, if good reasons should be adduced by plaintiffs in their reply.

But 2d. It was not, even at the time it was written, and even if it were to be considered a *final determination*, a declaration that the defendants refused to deliver the ice during that season; because they expressly declare that if ice went down, during the season, to the price at which plaintiffs had in the previous season offered their ice, defendants would deliver the ice.

Here, therefore, was practically a declaration that, as plaintiffs were demanding the ice in *July*, and therefore *wrongfully demanding* it, as the season had not closed, they, defendants, would, if plaintiffs insisted on their then demand, pay them in cash what ice had been worth the previous season, or they would give the ice itself if it got to those prices.

Now suppose ice *had* fallen to 50 cents during the season; clearly then defendants would, according to their promise, have delivered the ice.

Instead, therefore, of the letter, taken as a whole, declaring unequivocally that they would *not* deliver the ice that season, it declares that we will not deliver at the present price, but if it goes down to a certain price during the season, we *will* deliver it.

Now that it did not go down to 50 cents, does not touch the question whether the declaration in this letter was such an absolute, unequivocal refusal to deliver during the season, as justified the bringing of this action in July, without waiting to see if it did go down to the lower price.

How can a declaration that we will deliver during the season, if the ice goes down to a certain figure, be con-

strued to an absolute, unequivocal declaration that they would, in no event, deliver during the season?

3d. And independently of the foregoing, this Court, 15 Wall., 48, in the passage above quoted, says: "It must not only be a distinct and unequivocal, absolute, refusal to perform the promise, but must be treated and acted upon as such by the party to whom the promise is made; for if he *afterwards* continued to *urge* or demand a compliance with the contract, it is plain he does not consider at an end."

That plaintiffs did not understand Oler & Co.'s letter of July 7, 1880, as a distinct, absolute refusal to deliver the ice in 1880, is conclusively shown by their letter in reply, dated July 10, 1880, (printed Record, 15.) In this they "*urge*" defendants to review the matter and deliver the ice.

After discussing the whole subject, they say:

"Now whatever the *final settlement* of this matter, we want you to fill our order; otherwise we cannot tell what the result might be. It is not in our minds to do otherwise than right with anyone, and certainly with yourselves; and it is our great desire not to get complicated with the third party in that matter; and assure you that your regrets cannot exceed ours, that there should have arisen any *difference of opinion* concerning this affair: and certain it is neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view *upon further reflection*, we remain, truly yours, &c."

(*d.*) Then the only other thing relied on to show the refusal of defendants, is their letter of July 15, 1880, written in reply to plaintiff's letter of July 10. (Printed Record, 15.)

In this, Oler & Co., after expressing their desire to do what is right, and the regret of their inability to see the matter as

plaintiffs state it, they re-state the transaction of 1879 as they understand it; and then they say: "Now you ask us, *at* A TIME *when we are pressed by our sales*, and by *short supply* threatening us and others, to deliver to you the equivalent of ice taken from you under the circumstances stated."

Then, after saying they did not *consider* this fair, or in accordance with the agreement, and expressing their reluctance to have a difference of opinion with old friends, but that they feel justified in protecting their own interests, "always, however, with a proper regard to the *dictates of right*," they say: "We cannot therefore comply with your request to deliver you the ice *claimed;* and *respectfully submit* that you ought not to ask this of us, in view of the fact stated herein, and in our letter of July 7."

Then, after saying that plaintiffs did not *reply* to defendants' *arguments*, but only asked them to surrender their well fixed *opinion*, the letter asks "Can you *reasonably* ask us to do this?"

"Is not your usually clear and equitable judgment clouded by manifest considerations of self interest pressing on you?"

Then, in conclusion, after asking Dingley Bros. to consider *anew* all the circumstances of the case, and expressing the belief that if they do so, they will be led to admit their request not reasonable, the letter concludes: "We would be glad to *hear* from you *in reply*, but would be more pleased to have a *personal interview*, and venture to suggest that you come here (Baltimore) for the purpose," giving reasons why they could not go to see Dingley Bros.

Now upon this letter we submit, with confidence—

(*a.*) That so far from an absolute refusal to comply with their contract, this letter was intended to continue the friendly discussion already begun, with the hope of persuading Dingley Bros. to take the same view of the contract as Oler & Co. did, and it not only invited the further views of Dingley Bros., but urged a personal interview, with a view to some common and friendly understanding.

How can this be treated as such an absolute, unequivocal refusal to comply with the contract, as is required in all the cases?

When the letter says, "we cannot comply with your request to deliver you the ice claimed, and respectfully submit you ought not to ask this of us, in view of the facts stated herein, and in our letter of the 7th," this, in connection with the request for further correspondence, or a personal interview, can only mean that while this was their then opinion of what was fair and right, they were anxious for a personal interview, to see if such interchange of views would result in a change of their opinion.

(*b.*) Moreover, and independently of the preceding views, there is no retraction of the offer made in the letter of July 7, to deliver the ice should it get down to the price therein named.

And the only request which, in this letter of July 15, Oler & Co. say they cannot comply with, is the request made to deliver the ice "*claimed;*" that is, to deliver the ice *at that particular time*, which was the request made by Dingley Bros. in their letter of July 10. (Record, 15.) Oler & Co. say: "Now you ask us, *at a time* when we are pressed by our sales, and by short supply, &c."

There is, therefore, in this letter, no refusal to deliver later in the season.

(*c.*) Upon the receipt of this letter, and within three or four days after its receipt, and without a word of reply or warning, the plaintiffs bring this action on July 21, 1880.

(*d.*) Assuming that the Court follows Hochster vs. DeLa-Tour, and the cases adopting it, the cases with one voice declare that this, as it were, exceptional doctrine, will never be applied but in cases where the refusal in advance of the time is absolute, unequivocal and distinct.

We believe no case can be found where it has been applied upon facts like those in this Record.

If we are right in either the 1st, 3d or 4th of our propositions, above presented, (Record, 14,) it results that the action cannot be sustained, and the judgment on our appeal must be reversed, without a *venire facias de novo.*

Proposition No. 5. But at all events, the rulings on Dingley Bros.' appeal must be affirmed.

Their exceptions are found on page 23 of the Record.

The 1st exception is to the ruling "that defendants had the whole of the shipping seasons of 1880, if they chose to demand it, in which to deliver the ice." This ruling we have considered under our 2d proposition, (brief, page 21,) and if that proposition is correct, the ruling was correct.

The other two rulings excepted to by the plaintiffs are practically one; that is, that the measure of damages was

not the price of ice in July, 1880, but the price to which it fell before the close of the season. (Record, 23.)

. If the defendants had the right to all the season in which to deliver, it logically results that they were in no default for not delivering in July, 1880, and the default did not arise until the close of the season; and the established rule is that damages are to be assessed as of the time at which delivery should have been made.

The rule is of course familiar, but is thus stated in Benjamin on Sales, volume 2, section 1118: "The date at which the contract is considered to have been broken, is that at which the goods were to have been delivered, and not that at which the buyer may give notice that he intends to break the contract, and refuse accepting the goods."

And the very line of cases, (Hochster vs. DeLaTour, Frost vs. Knight, &c., &c.,) which hold that an action may be brought in advance of the time fixed for performance, if the party announces his refusal to be bound by the contract, all hold, without dissent, that the damages are to be ascertained with reference to the utmost limit of time up to which the party would have had the right to deliver, if he had not announced his determination not to perform the contract.

And indeed this is the logical consequences of the doctrice announced in those cases.

1. For if the defendants had made no announcement, in advance of the close of the season, of their determination not to fulfil their contract, but had kept quiet on this point, and simply allowed the season to go by without delivering the ice, then it is clear on all the authorities, as they were in no default till the close of the season, the price of ice at that period would have been the measure of the damages.

2. Now, admitting the soundness of the doctrine of Hochster vs. DeLaTour, and the cases which have followed it, it is very clear that the defendants can be in no other position by announcing, in advance of the time of performance, that they will not perform the contract, than if, when the time for performance came, they failed to perform it.

The only consequence, according to these cases, of the announcement in advance, is that the other party may, at once, on this announcement, bring an action to *enforce* the contract, treating the announcement in advance as having the same effect on the contract as a failure to perform it at the time performance is due, would have. But *what* is to be enforced by the action that may be thus brought, prematurely, so to speak? Why, manifestly, the contract which the parties have *entered into*, and not a *new* contract, to be impliedly made by the Court. Now the contract which the parties have entered into, is a contract to deliver at the *end of the season*, if the defendant choses to wait so long, and *not* a contract to deliver in *July*. Now the plaintiff cannot, by bringing his action in July, change that contract.

All that the Court can do in the action brought in July, is to award such damages as would have been awarded at the time to which the party had the right to delay the delivery, where those damages are less than at the time of the announcement, because the defendant, having the option as to time of delivery, we must assume he would have delivered at a time when the cost was lowest.

There can of course be no difficulty in ascertaining the damages at that period in this case, because the trial did not take place till 1881.

Accordingly, in the case of Cort vs. Ambergate R. R. Co., 17 Add. & Ell. N. S. page 127 the Court, Coleridge, *at nisi prius*, and Lord Campbell, in Court in banc, said that plaintiff ought to be put in same position, as if he had been permitted to *complete the contract.*

And thus Cockburn, (C. J.,) in Frost vs. Knight, Law Rep. 7, Exch. 114:

"The contract having been thus broken by the promisor, and treated as broken by the promisee, performance *at the appointed time* becomes excluded, and the breach, by reason of the *future* non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the *eventual* non-performance may, therefore, *by anticipation*, be treated as a cause of action, and the *damages* be assessed and recovered in *rsepect* of *it*, though the time for performance may yet be remote."

And again: "It has been urged that there must be great difficulty in thus assessing damages prospectively. * * * It cannot be said that the difficulty is by any means insuperable."

And so in Phillpots vs. Evans, 5 M. & W. 475, (which on this point is expressly approved in Hochster vs. DeLaTour, 2 Ell. & Bl. 692,) the Court held that the plaintiff was entitled to damages, according to the state of the market when the wheat *was to be delivered*, though there had been a declaration in advance of the time at which the wheat was to be delivered, that the defendant would not perform his contract to accept it.

And so in Riper vs. Johnson, Law Rep. 8, Com. Pleas, 167, where defendant agreed to sell plaintiff 3,000 tons of

coal, deliverable in May, June, July and August, and defendant, on 31st of May, wrote that he would not deliver any coal under contract; here the Court, recognizing the doctrine of Hochster vs. DeLaTour, after a full discussion of the whole question of the time, as of which the price of the article contracted to be delivered, is to be taken, say it is the time at which the article would have been delivered, if the contract had been performed. See this case for an exhaustive discussion of the whole subject.

And see also, Brown vs. Muller, Law Rep. 7 Exch. 319.

In this case, Kelly, C. B., says—(329:)

Now the plaintiff might, *if he* had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and even although he had elected thus to treat the contract, yet, in considering the question of damages, they would be still estimated with reference to the times at which the contract ought to have been performed.

See also, 9 B. & Creswell, 145, Boorman vs. Nash.

It follows, therefore, that supposing the action can be maintained, the rule of damages was correctly ascertained by the Circuit Court, and the rulings of the Court should be affirmed on the plaintiffs' writ of error.

For reasons hereinbefore stated, we respectfully submit it should be reversed on defendant's writ of error.

BERNARD CARTER,
For Oler & Co.